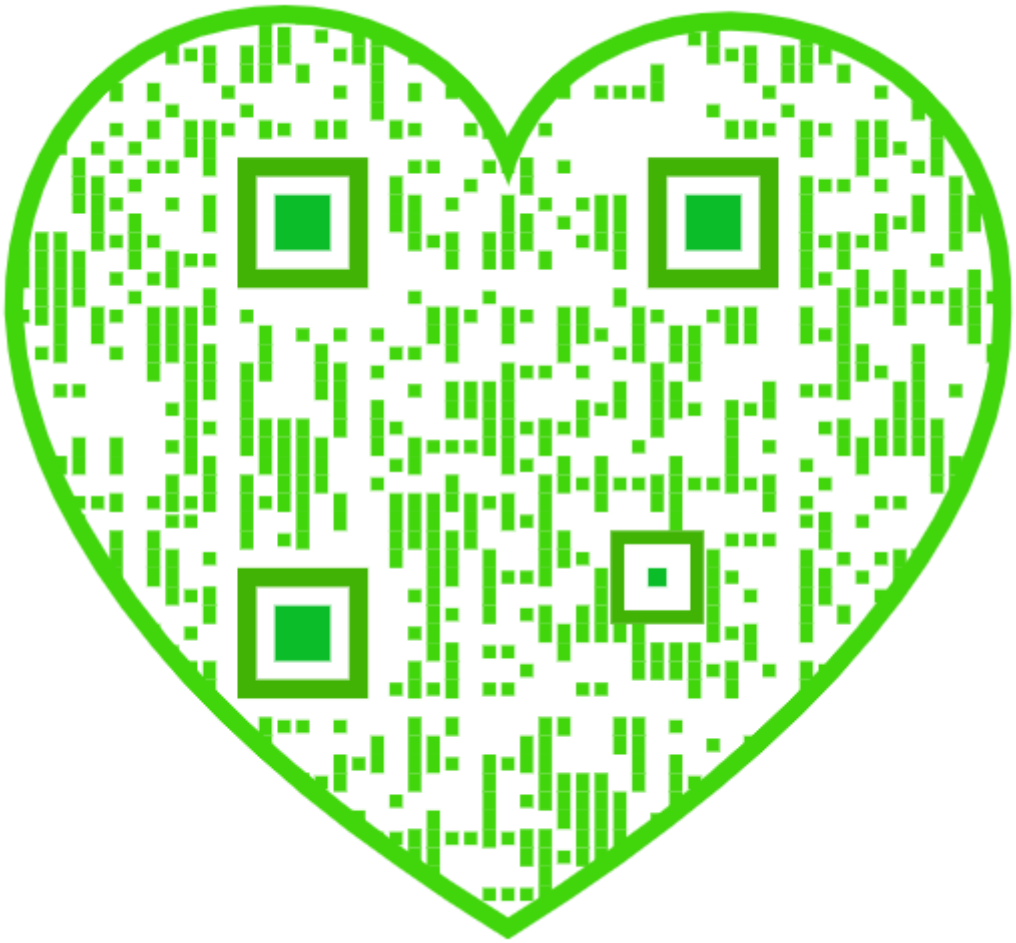

THE AMERICAN PHILOSOPHY OF GOVERNMENT

ESSAYS

BY

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ESSAYS

THE AMERICAN PHILOSOPHY OF GOVERNMENT

THE AMERICAN PHILOSOPHY OF GOVERNMENT AND ITS EFFECT ON INTERNATIONAL RELATIONS

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UNTIL quite recent times, it would have been unprofitable, in the case of most nations, to inquire what the philosophy of government held by the people was, or what effect it had on the foreign relations of the nation, or on international relations generally. There were few nations in which the people were so enlightened and expressed themselves so fully that it was possible to distinguish and define the particular philosophy of government held by them; and even if it had been possible to do so, it would have been of little use to try to discover what effect this philosophy had on international relations, since the fact was that it had little or no effect. The people of each nation, ignorant of foreign affairs by reason of the difficulties of travel and communication, allowed the executive to control the foreign relations under the advice of a council in the selection of which they had no voice, and representing privileged classes of persons who used the power of the nation as means to accomplish such ends as they thought desirable.

So long as this condition of things was general, the rights of nations occupied the attention of writers. The

rights of man, the rights of peoples, and the rights of society in general were ignored, as were the responsibilities which necessarily accompany all rights. Each nation sought to aggrandize itself by conquering and pillaging others, and the only restraint on one nation trespassing upon another was that all the so-called civilized nations were gradually forced, by the pressure of circumstances, to enter into the playing of a military game of forcible checks and balances, called "the balance of power" or "the political equilibrium."

The principle of this game was very simple, though, like most other games, the rules for playing it were very intricate. When any nation, for the purpose of direct gain by pillage of its neighbors or by despoilment of the natives of barbarous regions, or for the purpose of indirect gain by destroying its competitors in trade or opening up new trading points, desired to conquer adjacent or distant regions—thereby increasing its military and naval strength and paving the way for further expansion—the surrounding nations combined their military and naval strength by alliances until the proposed expansion was balanced and checked, or until the opposing nations, or all the nations concerned, were "compensated" by partitioning between them some weak country which had been crushed in the course of the war. Thus what was called the *status quo* or the "political equilibrium" was maintained.

So long as the people of each nation remained unenlightened and were without full power to express their ideas through representative institutions, the war-game of "the balance of power" ruled international politics, and international disputes were disputes concerning the "rights of nations," and particularly on points of "national honor." The citizens of each nation had only partial and indefinite rights at home, and citizens of

one nation had no rights in another nation or against a foreign government. A person abroad had only certain privileges, and these usually were based on treaty. Breaches of treaty were considered to involve the national honor not of the nation breaking the treaty, but of the other nation, and led to war or to a new disposition of alliances according to the rules of the war-game.

As the people became more enlightened, and obtained an increasing participation in their own government by representation and by compelling their governments to be responsible to them, there gradually arose in each nation a popular philosophy of government, in which the rights of individuals, of peoples, and of human society in general, were distinguished from the rights of nations. The houses of representative legislatures, and particularly the houses directly representing the people of the nation, as their members became increasingly better informed concerning foreign affairs through increased facilities for travel and intercourse, insisted with greater and greater force that the philosophy held by the people should have its effect upon foreign relations as well as upon domestic affairs. The war-game of the balance of power everywhere came under criticism. At the present time its principles are beginning to be known, and there is a growing understanding of its intricate rules. The classes and interests which have heretofore had the monopoly of this knowledge, and which in all sorts of secret ways were able to use the nation and determine its moves, are being haled into the daylight and exposed to the destructive power of publicity. Indeed the danger at the present time is that in the control by the people of each nation over national and international affairs, the just rights of nations to live and protect themselves, and to be the guardians of the rights of individuals, of peoples and

of society at large, will be ignored, and that the whole structure of organized society will be weakened, to the detriment of individual liberty.

It becomes, therefore, important to consider the philosophy of government held by the people of each nation, and particularly of those which have advanced farthest along the path of popular government, for the purpose of ascertaining how this philosophy is likely to affect international relations. It is particularly desirable to consider the philosophy held by the people of the United States, and extended to its annexed countries, since this is one of the two great philosophies of popular government now prevailing in the world; the other being that held by the people of Great Britain, which has extended more or less completely to the self-governing states of the British Empire, and to the nations of the Continent of Europe.

Every philosophy of popular government tends to the establishment and enlargement of the rights of the individual. When we speak of "popular rights," we mean the rights of the individual. It is true we may speak of the rights of one people against another, or the rights of society against peoples, but these are figurative expressions. They all come down, in the last analysis, to the rights of the individual. The important thing, therefore, in examining a philosophy of government held by the people of a nation is, to reach a definite idea concerning what the rights of the individual are under this philosophy, into what classes and grades they are divided, how they are considered to arise, whether they are considered to be against the government or against all governments as well as against other individuals, and how it is considered they ought to be safeguarded.

The crux of the whole matter is, however, whether the individual, according to the philosophy of govern-

ment held by the people of the nation has rights against the government, and, if so, why and to what extent? It is particularly important to inquire whether they base the rights of the individual against the government on grounds which logically require them to hold that all individuals have rights against all governments. If the people of a nation do hold that there are rights of individuals against governments, and particularly if they hold this idea for reasons which, logically followed out, require them to hold that all individuals have rights against all governments, this philosophy is bound to have an effect upon international relations.

There can be no doubt but that the proposition that there are certain rights of the individual against the government does form the most fundamental part of the American philosophy of government. We are accustomed to see every branch of our government carefully scrutinizing every governmental action lest it may be found to infringe certain rights of the individual. Every governmental agency, from the Congress and the President downwards throughout the United States, and from the Legislature and Governor downwards throughout the States, is bound by certain express constitutional prohibitions which are designed for the protection of these rights, and if these constitutional prohibitions are infringed by governmental action, the action is nullified by the Supreme Court of the United States or by the court of final jurisdiction in the State. Thus the conception that there are certain rights of the individual against governments, which no government can infringe except upon penalty of having its act nullified, is a very living one among the people of the United States.

If the people of the United States held that these rights were merely rights which they thought it expe-

dient for their citizens to have, their citizens would have these rights merely as citizens. Such a doctrine would make little difference to the rest of the world. Any rights which we think it merely expedient that our citizens should have at home are of course of little effect abroad. But we do not base our belief in these rights of the individual against the government upon any grounds of national expediency. We assert that every citizen of the United States has certain rights against all other persons and against all governments, because these rights arise out of the necessities of human nature and because it is essential to human society that every individual should have these rights. We say that these are "fundamental rights" and are not only universal but are "unalienable"—that is, that persons cannot convey them to governments and thereby give governments absolute power over them. This makes our philosophy international, as well as national. Our people and all who dwell in our midst or under our jurisdiction, have fundamental rights against our governments not merely as citizens of the United States, or as under its protection or jurisdiction, but as human beings living in the society of other human beings. These fundamental rights, according to our philosophy, must therefore arise under a law growing out of the necessities of human nature, which is supreme over the United States and over all individuals, peoples, and nations, and which arises from the act of a legislator external to the United States.

What then, are these fundamental rights which thus arise under a law made by the legislative act of a power external to and supreme over the United States, and what is this external and supreme law under which we consider these rights to exist?

The Declaration of Independence contains the only af-

firmative statement concerning these fundamental rights and this external and supreme law. In the preamble, it is said: "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Thus the Declaration divides all rights of individuals into two classes. In the first class are certain unalienable rights with which each man is endowed by his Creator, and among which are the rights of life, liberty, and the pursuit of happiness; in the second class are all other rights. This first class the Supreme Court of the United States calls "fundamental rights"; the second class it calls "artificial or remedial rights," since the rights of the second class must be consistent with and in aid of those of the first class. The fundamental rights are "recognized, but not created, by the Constitution;" that is to say, by the people of the United States, through the Constitution. (Logan *v.* United States, 144 U. S., 263, 293.)

The artificial or remedial rights are created by the people or the government of the United States, or by the peoples or the governments of the States. The Supreme Court says of these rights that they are "peculiar to our own system of jurisprudence:" thus distinguishing them from fundamental rights, which are of course, in our view, common to every system of jurisprudence, including the international system. (Downes *v.* Bidwell, 182 U. S., 244, 282.)

The definition of the fundamental rights of the individual as including his rights of "life, liberty, and the pursuit of happiness," given in the Declaration, is too indefinite for practical use. When, however, we go

back to the literature of the Revolutionary period and use it as a contemporary exposition of the meaning of these words, the definition becomes clear and practical. The fundamental or common rights are those corresponding to the common attributes which all men have as a necessary part of their human nature and as essential to the existence of human society. These attributes are life, the power to move and the power to use lands, things, and forces in the pursuit of happiness. Inasmuch as these common attributes with which all are equally endowed by and at their creation give rise to common necessities, it follows, as we believe, that there must be a supreme and fundamental law of human society recognizing these common attributes and these common necessities and conferring rights upon each individual to satisfy his necessities. The fundamental rights of the individual may thus be stated to be the right to so live, to so move, and to use such part of the land, things, and physical forces of the universe for his support and happiness, as is consistent with the common and equal right of every other individual to such life, to such motion, and to the use of lands, things, and forces for the same purpose. Though these fundamental rights cannot be alienated by any individual to any person or government, the individual may of course forfeit them to society for anti-human and anti-social acts done by him, and it is the function of governments, subject to the ultimate superintendence of the people of each nation, to adjudicate the total or partial forfeiture of these rights by due process of law and to enforce forfeitures so adjudicated. The right of an individual to use exclusively lands, things, or forces, which we call property, is evidently to some extent a fundamental right and to some extent an artificial right. Thus the Declaration does not regard property as a

fundamental right. On account, however, of the difficulty of determining the extent of property which the individual may own as a matter of fundamental right, we protect all the property which an individual owns, equally with his life and liberty, so as to prevent it from being taken from him "without due process of law,"—thus requiring proper legislative action, proper judicial determination and proper executive action as a precedent to the forfeiture.

The nations which recognize the fundamental rights of the individual have various expedients for safeguarding them. These rights may evidently be infringed by individuals or by governments. The courts in every civilized country are the especial guardians of fundamental rights in so far as the customary law is concerned. Courts everywhere refuse to apply customs as rules of law when the customs are contrary to fundamental rights. But when the legislature has enacted a law, the courts of most nations are powerless to consider whether it infringes the fundamental rights of the individual. Thus, in most nations, the individual has no rights against the government, or at least against the legislative branch. Experience has shown, however, that each individual has quite as much to fear from the action of governments—even from the popular legislatures—in infringing his fundamental rights as from other individuals. A government, or the legislative part of it, is, after all, only a group of individuals, and it may, like any other group of individuals, violate the fundamental rights of individuals. Even if the government is directly responsible to the will of the majority of the electors, the majority may compel the government to violate the fundamental rights of the individual unless some way is found for nullifying such governmental acts even though commanded by the majority.

The British system of responsible government recognizes the fundamental rights of the individual, but gives no protection to the individual against infringement of his rights by the government except by concentrating responsibility in a small committee called the Cabinet, and making the tenure of office of the Cabinet depend upon its having a majority in the popular House. The theory is that if the Cabinet attempts to induce any branch of the government to infringe the fundamental rights of the individual, or sanction such an infringement, it will lose its majority and go out of power, to be supplanted by a Cabinet which will see that these rights are protected.

The people of the United States have adopted a different method of protecting these fundamental rights. In the Constitution of the United States, and in the State Constitutions, are inserted prohibitions upon certain forms of governmental action found by experience to be likely to occur if not prohibited, and which endanger or destroy the fundamental rights of the individual. These prohibitions are the most fundamental parts of the Constitution, and no governmental powers can be exercised contrary to them. That is to say, they are supreme over all the rest of the Constitution and over all governmental action which the particular Constitution affects. The Supreme Court of the United States has said—to repeat what has been above quoted with its immediate context—that there are "certain fundamental rights, recognized and declared, but not granted or created by the Constitution, and thereby guaranteed against violation or infringement by the United States, or by the States, as the case may be." The following is a collation of the provisions of the Constitution of the United States, prohibiting certain kinds of governmental action by the Government of the United States

for the protection of fundamental rights, which has received the approval of the Supreme Court. (Logan *v.* United States, 144 U. S. 263, 293.)

(This collation was made in the Instructions of the President to the Commission for taking over the Civil Government of the Philippines from the Military Authorities, dated April 7, 1900, and is quoted in Kepner *v.* United States, 196 U. S. 100, 123. In those instructions it was declared that "there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom," and that "there are certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law." The above quoted constitutional prohibitions were spoken of as the "rules of government" which are "inviolable." See further on this subject an article on "The American Philosophy of Government and its Application to the Annexed Countries," by the author of this article, in the Proceedings of the American Political Science Association for 1913, Vol. 10, p. 76.)

"That no person shall be deprived of life, liberty, or property, without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude

shall exist except as a punishment for crime; that no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

The Supreme Court has said of this collation of Constitutional prohibitions:

These words are not strange to the American lawyer or to the student of Constitutional history. They are the familiar language of the Bill of Rights, slightly changed in form, as found in the nine amendments to the Constitution of the United States, with the omission of the provision preserving the right of trial by jury and the right of the people to bear arms, and adding the prohibition of the thirteenth amendment against slavery or involuntary servitude except as a punishment for crime, and that of Art. 1, §9, to the passage of bills of attainder and *ex post facto* laws. These principles . . . were carefully collated from our own Constitution, and embody almost verbatim the safeguards of that instrument for the protection of life and liberty. (Kepner *v.* United Stares, 195 U. S. 100, 122, 123.)

The Supreme Court has itself definitively attached to the rights secured by these Constitutional prohibitions the name of "fundamental rights." (Hawaii *v.* Mankichi, 190 U. S. 197, 217; Kepner *v.* United States, 195 U. S. 100, 123; Dorr *v.* United States, 195 U. S. 138, 144, 148.)

Substantially these same Constitutional prohibitions against governmental action are inserted in the Con-

stitutions of the various States of the Union. Through the interpretation and application of these prohibitions of the Constitutional Bill of Rights, made by the Supreme Court of the United States as respects governmental action of the United States, and by the courts of final jurisdiction in the States as respects governmental action of the States, the principles of this supreme universal law under which the fundamental rights of the individual exist, are being gradually evolved by a process of exclusion and inclusion. Of course the courts cannot be allowed to have absolute finality in making decisions of such great importance, which involve the interpretation and application of a law which is supreme over the people of every nation and over every nation, and the nullification of acts of popular legislatures. Where decisions made by courts are believed by the people of the nation to have been based on a wrong interpretation or application of these fundamental constitutional prohibitions—that is, on a wrong interpretation and application of this supreme universal law—the people of each State or of the nation may and doubtless ought to arrange for some appropriate process of revision, but every revisionary process must be so arranged and safeguarded that it will be most likely to result in the fundamental rights of the individual being secured to him. The practice of intrusting the courts of final jurisdiction with this great function is on the whole satisfactory to the people of the United States, since if the courts err they may also correct themselves in later decisions; and the theoretical right of the people to provide a revisionary tribunal or process or to exercise direct revisionary power, is not likely often to be insisted upon. There is great danger to the fundamental rights of the individual in revisionary action by direct popular vote, or even by a special

tribunal or a special form of legislative action. The people of the United States are fully alive to these dangers, and there seems to be every probability that our system will never be essentially changed, and that such changes as are made will be for the purpose of rendering it more perfect.

It follows from the American philosophy of government that we regard all our organized communities—even the United States and the States—as corporations. The citizens of the State or of the nation are the members of the corporation, and the government is a governing agency or governing board. The object of all government, as we view it, is to secure the fundamental rights of the individual, and the powers of governments are limited to this purpose. Every organized community is, by virtue of the fact that it is a corporation, democratic and representative. Corporations may of course form themselves into a corporation and frequently do so when the operations are widely extended —the greater corporation so created being given superintending power for the general purposes. We apply this same idea, and our States as corporations have formed themselves into a federal corporation or federal nation. Thus the American philosophy of government necessarily results in democratic, representative, and federal institutions.

The fact that some of the peoples of the world are beginning to hold a philosophy of government which distinguishes between fundamental rights and artificial rights, has already had a profound effect upon international relations and is likely to have still greater effects; for out of the acceptance of the belief in fundamental rights grows the belief in the rights of individuals against governments, and of the propriety and necessity of constitutional prohibitions imposed by

peoples or by society at large upon governments, for the protection of these rights. The individual thus becomes a subject of the public international law, as well as the nations. The old theory that international law, or the law of nations, was concerned solely with the rights of nations is already modified. We look at the real parties in interest, and discover that in an increasing number of cases an individual or a group or class of individuals is the real party on one side and a nation as a corporation the real party on the other. Individuals who are sojourning in a foreign nation often come into direct conflict with the government of the nation; and individual citizens of one nation frequently make contracts with a foreign nation. Thus the question arises in various ways, what rights have citizens of one nation against another nation?

Some European writers on public international law have already noticed the change which is taking place in the views held concerning the subjects of international law growing out of the increasing belief in the fundamental rights of the individual—the rights of man, as the French call them. Thus in the *Manual de Droit International Public*, by Bonfils, revised by Fauchille, it is said:

> The nations, considered as members of the international community, are *par excellence* international persons. . . . But are they the only international persons? Yes, if one uses the expression "international persons" as synonymous with and equivalent to "members of the international community." But if, giving another meaning to this expression, one designates by the term "international persons" all the beings whose juridical situation is regulated by the public international law, whose rights and duties are determined and whose privileges are restricted by this law, as subjects

of this branch of the law, the nations are not the only international persons. (6th Ed. 1912, Pars. 154, 157.)

Speaking of the individual man as one of the subjects of the public international law, these authors say:

Man, as a member of humanity, has an individuality of his own, says Pasquale Fiore, a sphere of action which may include all the regions of the globe, a juridical capacity belonging to him by reason of his mere existence and independent of that which may be recognized as pertaining to him as a citizen of a nation. . . . Heffter classes among the immediate subjects of international law man considered by himself, and the citizens of a nation in their relations with other nations. He develops his thesis by examining the primordial rights of man, of which the idea of personal liberty is the foundation, and which are not to be confounded with political or civil rights. . . .

Undoubtedly the individual man is not an international person of the same kind as the nations. Among other differences, there is one which is very marked: From the point of view of international law, the nation has a simple character, in that it is and can be subject only to international law. The individual man, however, has a composite and mixed character, in that he is, at one and the same time, subject to international law, and to the particular law, public and private, of his own nation. These two qualities exercise on each other a reflex influence. To refuse to regard the individual man as an individual person, is to sacrifice the first to the second.

Has not every man certain fundamental rights? Without regard to the nationality of the individual, are not the inviolability of the human person as against the slave trade, the security of private property as against piracy, now placed under the protection of international law?

These same writers have this to say regarding the rights of individuals, as citizens of a nation, against another nation:

Moreover, each individual, however isolated, has everywhere, as a native of a particular nation or as under its jurisdiction, certain rights based on the principles of international law. The violation of these rights is an injury, not only to the individual, but to the nation of which he is a citizen. The subject of the rights of the native inhabitants against a foreign conqueror, of the rights of foreigners to enjoy special rights against uncivilized natives, the subject of naturalization, and of emigration, fall within the jurisdiction, in varying degrees, both of international law and of national law. Do not disputes and conflicts arise between nations regarding emigration and naturalization? Is not the matter of the extradition of criminals, though it so profoundly concerns the individuals charged with crime, essentially a matter of public international law? In these cases, and in many others, the citizen of a nation finds himself in contact, in relationship or in conflict, not with the subjects of another nation, but with the nation itself. It is as respects this nation, as an international person, that the relationship must be determined, or the dispute settled. This relationship or this dispute is of an international kind and is subject to be determined by international law, just as analogous relationships or disputes arising between a nation and one of its own citizens are determined by the national law.

It is important to distinguish, as these writers do, between the claims of individuals against a foreign government based on violation by the foreign government of the fundamental rights of the individual and the claims of individuals against a foreign government based on violation by the foreign government of the rights which the individual has as a citizen of his own nation. The Constitution of the United States distinguishes between the two classes of cases. The Supreme Court of the United States has jurisdiction of all cases involving the fundamental rights of the individual (the

Fourteenth Amendment having made the United States the guardian of fundamental rights against infringement by the States), regardless of whether the complainant is a citizen of the United States, or of the State of which he complains, or whether he is a foreigner. He claims these rights simply as a human being, and not as a citizen of the United States or of a State. In cases not involving fundamental rights, arising between a State and citizens of another State or between citizens of different States, or between a State, or the citizens thereof, and foreign states, citizens, or subjects, the Supreme Court has jurisdiction by virtue of the citizenship of the parties. In this class of cases, the individual has rights only as a citizen of a State.

The truth seems to be that when an individual claims that his fundamental rights have been infringed by a government, whether the government is his own or a foreign one, he appeals neither to international law nor to national law, but to a law which is supreme over all peoples and all nations, and which grows out of our common human nature and the nature of human society. This law no people or nation can "create"; it can only "recognize" it. As respects rights that are not fundamental—that is, which are artificial or remedial, each individual is subject to the rules of international law or of national law according to the nature of the case and according to the citizenship of the parties. But as respects his fundamental rights, each individual and each government is subject to the rules of the fundamental and universal law which is supreme over both international and national law, and is pervasive throughout the whole society of peoples and nations regardless of national limits. Though the American people have in fact secured the fundamental rights of the individual by our own national law, through con-

stitutional prohibitions, we do not regard these fundamental rights as created either by our own national law or by international law, but by a law universally pervasive and supreme over both, which we "recognize," and which we consider that we must recognize on penalty of reversion to barbarism. One may adopt the religious hypothesis and call this supreme universal law the law of God, or the philosophical hypothesis and call it the law of nature, or the juridical hypothesis and call it the law of human society. Perhaps the simplest way out of the difficulty of determining the source of this law is to regard it as a law made by human society as an organized unitary community, and to call it "the fundamental law," understanding by this that law which is supreme over all other human law, whether international, national, or municipal, and which deals directly with the rights of the individual man as a human being as against all human society. As Bonfils and Fauchille say, slavery is abolished everywhere because society in general feels that it is in violation of the fundamental rights of the individual merely as a human being regardless of his citizenship, and hence destructive of all human society. That there are rights of the individual which he has merely as a human being and which follow him throughout the world, is proved by the fact that each enlightened human being, if he searches his own conscience, finds himself compelled so to believe. The existence of this law cannot be proved by ordinary methods of proof. It must be accepted as an axiomatic and self-evident truth.

The supremacy which the American people attribute to the fundamental law is what may be called a limited supremacy—a supremacy within a certain definite sphere. Just as the Constitution and laws and treaties of the United States are not supreme over the Consti-

tutions and laws of the States for all purposes, but only for certain purposes which are in fact the general purposes of the Union, so the American people must necessarily believe that the public international law is supreme only for the general purposes of the whole international society over national constitutions and laws; and so also they must necessarily believe the fundamental law is supreme over the public international law and all national constitutions and laws only for the still more general purpose of securing those fundamental rights of the individual which attach to him merely as a human being and not as a citizen of the international community or of a particular nation. Thus, according to the American view, there are four kinds of supreme law, but the supremacy of each is within a certain sphere. There are certain activities and relationships of an individual which are necessary to him as a human being equally with all other human beings. Questions concerning his rights to these activities and relationships, whether the rights are claimed against individuals or against the government, are to be determined according to the principles of the fundamental law. There are other activities and relationships which each individual claims and enjoys as a citizen of a nation in or against another nation or its citizens. These rights are determined by international law. There are still other rights which the individual claims and enjoys as a citizen of a particular nation within the nation. These rights are to be determined by the law of the nation of which he is a citizen. In federal states, there are rights which the citizen of a state enjoys within a state and which are exclusively determined by the law of the state. At present the old rule which made all governmental action of cities and towns legally subordinate to the governmental action of the state

applies, but there are signs that there is arising a conception of certain rights which a citizen enjoys as a citizen of the city or town. The courts within the United States actually apply these principles as a matter of course in their decision of cases. If, under the facts of the particular case and the issues formed in the case, the fundamental rights of the individual are involved, the constitutional prohibitions for the security of fundamental rights are applied. If, under the facts and issues, the rights of the individual as a citizen of a nation in or against a foreign nation, or as a citizen of a foreign nation against the nation or a State, are involved, the case is decided by international law; if the rights of the individual as a citizen of a State against another State or of citizens of one State against citizens of another are involved, the case is determined by the law of the United States; if the rights of the individual as a citizen of a State within the State are involved, the case is determined by State law.

This hierarchy of laws springs, as has been seen, from a hierarchy of communities. At the top stands all human society regarded as a single corporate unit, which is the theoretical legislator of the fundamental law under which each individual has certain rights against all other individuals and all governments, simply as a human being belonging to this society by reason of his creation as a human being. Next comes the federalistic organization composed of all the nations of the world—or all the civilized nations—regarded as a consociation of nations. This consociation is the legislator of international law or the law of the society of nations, under which each citizen of a nation has certain rights against other nations and their citizens, and rights in the high seas and other property common to all the nations. Next come the particular nations, each of

which is the legislator of its national law under which each citizen of the nation has certain rights within the nation. In federal states, the nation is the legislator of the national law and the State of the State law, and each citizen of a State has certain rights under State law within the State, different from his rights as a citizen of the nation.

The doctrine of fundamental rights has, however, no more necessary connection with the idea of the federal state or nation than with that of the unitary state or nation. It is equally necessary for the people of a unitary nation, as for those of a federal one, to recognize the fundamental law and to protect the fundamental rights of the individual against all other individuals and against all governments by constitutional prohibitions against certain forms of governmental action. This is evidenced in the United States by the fact that the people of the States impose the same prohibitions upon their State governments that the people of the United States impose upon the Federal Government. It is probably equally true that the idea of a federal state or nation gives rise to the idea of a fundamental law of human society as a whole and of fundamental rights under this law, and that the idea of fundamental rights under a fundamental law made by human society as a whole gives rise to the idea of a federal state or nation. But it is also true that a people may have an idea of a universal society, of fundamental law and of fundamental rights, without having any experience of a federal state or nation, and even though they believe in the unitary rather than the federal form of organization. France, with its idea of the rights of man, and Great Britain, with its idea of fundamental rights derived from the constitutional prohibitions upon certain forms of governmental action found by experience to be

dangerous or destructive to these rights, show that the conception of a fundamental law and fundamental rights has no necessary connection with the federal form of government. The constitutional prohibitions adopted by the people of the United States in the Constitutional Bill of Rights are in fact collated from Magna Charta, from the English Petition of Right, from the English Habeas Corpus Act, and from the English Bill of Rights, as these were developed in the Massachusetts Body of Liberties, in the Virginia Declaration of Rights, and in the original Constitutions of the States of the American Union.

The real difference between the United States and other nations is thus not so much one of the philosophy of government, as of the system which we apply to make the fundamental law and the fundamental rights of the individual practical and effective. No other nation imposes constitutional prohibitions for the protection of these rights upon all its governments and all their branches and makes these prohibitions the most fundamental part of the supreme law of the land so as to make the courts the guardians of these fundamental rights. Though we may believe that this system is not perfect, it has the tremendous advantage of keeping the conception of fundamental law and fundamental rights alive in the minds and consciences of the people. The knowledge that the most insignificant individual may call to his aid the protection of the courts against the acts of his State legislature and even against the acts of the national Congress if these acts violate these fundamental constitutional prohibitions, dignifies the individual and keeps before the mind of all the people the moral worth of each human being simply as a human being, a creation of God, and a member of human society. It dignifies government by enabling

the people to regard it in its proper aspect as an agency of the people having for the sole object of its institution the welfare and development of the individual. It compels the public official to exercise his power by judgment, since he is obliged in each case to decide before he acts whether he is acting within the jurisdiction assigned to him as an agent of the people to secure fundamental rights. There is no particular virtue in written constitutions in so far as they merely determine the frame of organization of the government and the distribution of functions between the different branches of the government and the different corporate members of the nation. Their virtue lies in the possibility of establishing, by means of them, constitutional prohibitions for the protection of the fundamental rights of the individual, and of making these prohibitions the fundamental part of the supreme law of the land. The limitations of power as between the different branches of government and the different corporate members of the nation may be established under unwritten constitutions, but the limitations of the power of a government as between itself and the individual can only be effectively established by a written constitution enacted by the people, in which are inserted constitutional prohibitions for the protection of the fundamental rights, which are by the people declared to be the fundamental part of the supreme law of the land, and which are interpreted and applied by the courts, subject perhaps to revision, in extraordinary cases, by an extraordinary tribunal established for the purpose.

It is because the people of the United States believe that they have a peculiar system of government which is essential, not only to their own liberty and their own society, but to individual liberty and human society everywhere, and which they hold in

trust for civilization, that they feel it their duty to protect their philosophy and their governmental system from such contact with other systems as might endanger its existence. This was the original basis of the Monroe Doctrine, and still continues to be its true basis. The belief in the fundamental rights of the individual which we hold, destroys all motive for conquest, since the only effect of conquest by us is to place upon us the difficult task of securing the fundamental rights of the individual in the countries annexed. We welcome the independence of nations which accept our philosophy and which honestly recognize the fundamental law and do their utmost to preserve fundamental rights. The rights of intervention in the affairs of the South American Republics, for the purpose of controlling them in the interest of Europe, was claimed in 1823 by the allied powers of Continental Europe as a logical result of their political philosophy and system. President Monroe declared that "the political system of the allied Powers is essentially different in this respect from that of America" and that "this difference proceeds from that which exists in their respective governments." Asserting that "to the defense of our own system, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, this whole nation is devoted," he concluded that we owed it "to candor, and to the amicable relations existing between the United States and those Powers, to declare that we should consider any attempt on their part to extend their system to any part of this hemisphere as dangerous to our peace and safety."

The whole effect of the Monroe Doctrine was that the American people were determined that their philosophy and their system should have every chance of surviving in the competition of philosophies and systems

to which it could reasonably be thought to be entitled. The philosophy of government then prevailing in Continental Europe denied the fundamental rights of the individual and asserted that all rights of men were created by the nation. The republics of Central and South America having established themselves and having nominally accepted the American philosophy of government and to some extent the American system, the United States asserted that the people of these nations should be free to develop themselves, hoping and believing that in the course of time they would fully accept the American philosophy of government and apply it effectively in their national affairs. The Monroe Doctrine is thus a doctrine of freedom. It had its origin in a conflict of philosophies. It had for its purpose the protection of the Central and South American Republics in developing and working out a philosophy and system which they had freely chosen. The Monroe Doctrine will die when nations of the world accept the belief in the fundamental rights of the individual and make these rights practical and effective; for by the acceptance of this belief and by the adoption of a practical system in accordance with this belief, all motive for conquest ceases, and nations will refrain from interfering in the internal affairs of other nations, since intervention will carry with it the heavy responsibility of securing the fundamental rights of the people of the invaded country, without possibility of great gains, and with only an uncertain compensation.

The fact that the American people hold this philosophy of government in which the securing of the fundamental rights of the individual is regarded as the object for which all government is instituted among men, profoundly affects the attitude which American statesmen must take in respect to every question growing out of

our foreign as well as our domestic relations. The officials of our Department of Foreign Affairs—which for historical reasons we call the Department of State—as well as our diplomatic officials, accustomed to regard the fundamental rights of the individual as the matter of prime importance, inevitably and properly apply our own constitutional tests to all proposals for joint action between the United States and any other nation, in the solution of questions arising between this nation and any other. To them the old conception of sovereignty, as a power of each nation to do what it wills, is impossible, since our philosophy compels us to hold that all national action is limited by the fundamental law.

The American philosophy and system of government —or more properly, the failure of other nations to accept our philosophy and system—particularly stands in the way of international arbitration and the judicial settlement of international disputes. With the drawing together of the whole world by the increased facilities for travel and communication, disputes tend more and more to be between an individual and a government or some branch of it. In every case of this kind there is a possibility that the question of the fundamental rights of the individual may be involved, so that in a similar case arising in the United States, the constitutional prohibitions for the protection of fundamental rights would be applied by the courts and the governmental action in question might be nullified. In this class of cases, when the United States is asked to submit to arbitration or judicial settlement, a grave difficulty arises. Inasmuch as the peoples of foreign nations do not impose constitutional prohibitions on their governments for the protection of fundamental rights and do not make these prohibitions the fundamental law of the land, the courts and the lawyers of European countries

are not accustomed to issues being raised concerning the validity of acts of government as respects fundamental rights. As it is necessary that European jurists should be in the majority on most arbitral or judicial tribunals in international cases, it follows that these tribunals are likely to treat some governmental acts as valid which we would hold invalid and nullify as infringing fundamental rights. Thus the United States must, for the protection and preservation of its own philosophy and system, refrain from submitting to the decision of such a tribunal any case which, if arising within the United States, would be considered as involving the fundamental rights of the individual under our constitutional prohibitions. So long as this difference in philosophies and systems continues, the only hope for the extension of international arbitration or judicial settlement would seem to be in making all action of international arbitral or judicial tribunals advisory to the nations which are the parties. This would permit these nations themselves to review the decision from every standpoint and to protect their own philosophies and systems. Acceptance of a decision by the parties would greatly increase its weight as a precedent for other nations, and would insure the execution of the decision by the defeated party.

The American philosophy of government also stands in the way of the codification of international law. No American can, consistently with his own fundamental beliefs, subscribe to a code of international law which does not contain constitutional prohibitions forbidding to all peoples, nations, and governments certain forms of action dangerous to or destructive of fundamental rights, and which does not make these constitutional prohibitions fundamental and supreme over all international and national law.

The United States is therefore at the present time in one sense a disturbing factor in the councils of the nations. Its disturbance is not of a physical kind, but of an intellectual and spiritual kind. It brings to the discussion of all international questions ideas of universal law, of fundamental rights of the individual as a created human being, of practical protection of these rights through constitutional prohibitions on all governments, based on popular and national recognition of fundamental law. To some these ideas may seem to be destructive, but they are really in the highest sense conservative and constructive; for the recognition of the rights of man is in no sense inconsistent with the recognition of the rights of nations. The American philosophy equally recognizes the rights of man and the rights of nations, holding that society can exist only through local organization, and that nations acting independently, but in concert, are the most appropriate means of securing the individual in his fundamental rights and in aiding him to extend his powers over nature.

The philosophy of the United States makes for peace. The wars which the United States has fought have all been for the purpose of protecting the fundamental rights of the individual and maintaining the nation as the guardian of these rights. There can be no true peace except where the individual has his fundamental rights, and where these rights are secured to him by the power of a nation. It is unlikely that the United States will ever apply physical force externally in the future except for the same purposes for which it has waged wars in the past. Such protective and defensive action its philosophy permits and in some cases demands.

THE DECLARATION OF INDEPENDENCE AS THE FUNDAMENTAL CONSTITUTION OF THE UNITED STATES

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Delivered before the Section for the Study of the Government of Dependencies, of the American Political Science Association, at the Meeting held at Providence, December 29, 1906.

YOU have heard ably discussed certain questions which arise out of the relationship between the American Union and the annexed Insular regions, viewed in its sociological and economic aspect. I now ask your attention to a question of immediate interest and importance growing out of this relationship viewed in its political, that is to say, its legal aspect. This question, which the Committee on Arrangements has called "The Question of Terminology," is: What are the correct terms to use in describing the political and legal relationship between the American Union and its distant annexed regions, assuming that this relationship is to be permanent and is to be on terms which are just to all parties?

More specifically, the question which I shall discuss will be, whether we, as Americans, ought, according to American principles, to use, in our political and legal language, the terms "colony," "dependence," and "empire," or whether we ought, according to those principles, to substitute for the term "colony," the term "free state," for "dependence," "just connection," and for "empire," "union."

It is needless to say that I shall accept the decisions

of the Supreme Court of the United States as final in regard to all the matters adjudicated in them. But the Supreme Court has jurisdiction only for the purpose of determining the rights of individuals. The political relations between the Union and the Insular regions, it determines only so far as may be necessary to ascertain individual rights. Its present doctrine—that the American Union has power over the Insular regions subject to "fundamental principles formulated in the Constitution," or subject to "the applicable provisions of the Constitution," protects the civil rights of individuals, but under it the power of the Union for political purposes remains absolute. The proposition which I shall offer for your judgment, will, I believe, not only not be in conflict with the propositions laid down by the Supreme Court, but will give a reason why they are right. It will, too, I believe, give a reasonable basis for our holding that the power of the American Union over the Insular regions, while ample for the maintenance of a just and proper permanent relationship with them under our control, is not absolute even as respects their political rights.

I have said that I shall discuss this question upon American principles. I shall not base myself on the Constitution of the United States, though I shall try to show the relation of that document to the question as I understand it. I shall assume it to be settled by the decisions of the Supreme Court,—as it seems clearly to be,—that with the exception of the "Territory" clause of that instrument, it is, and of right ought to be, the Constitution of the thirteen original States of the American Union and of the other States which they have admitted into their Union, and of no other States or communities; and that therefore it does not extend of its own force outside the American Union in

any constitutional or legal sense, but only in a metaphorical sense—this being as I understand it, the meaning of the Court when they hold, as they do, that, though the "Territory clause" is of present and universal significance as respects all the regions annexed to the Union, yet, with this exception, only "the fundamental principles formulated in the Constitution" are in force in the annexed regions. "Extensions," so-called, of the Constitution by Act of Congress, are of course mere Acts of Congress, and whether such metaphorical "extensions" are permanent will depend upon the terms and conditions of the "extension."

But though I shall not base myself on the Constitution of the United States, I shall nevertheless base myself on a great American Document, which preceded the Constitution as a statement of American principles, and which is so far from being inconsistent with it that the Democratic party, in its platform of 1900, called it "the Spirit of the Constitution"—I refer to the Declaration of Independence. It is the American principles set forth in that document which I shall try to discover. If I shall be adjudged to have rightly interpreted that instrument, it will follow that we ought to substitute, in our political and legal language, for the term "colony," the term "free state," for "dependence," "just connection," and for "empire," "union." In making such substitution, however, it will be necessary to give to the terms "free state" and "union," a scientific meaning which will differ from that which they now have in the popular mind, but which will, I believe, be the same as was given to these terms by the Revolutionary statesmen.

I shall not allow myself to be embarrassed by the fact that in my first published writing I used the terms "colony," "dependence" and "empire"; for at the same

time that I used these terms, I based myself on principles which were those of free statehood, just connection and union, to which I adhere to this day.

Taking the Declaration of Independence, therefore, as the exposition of the fundamental principles on which all American political theory is based, and to which all American policy must conform, let me state briefly the general meaning and purpose of this instrument, as I understand it.

As a result of the discussion for twelve years preceding the Declaration, the doctrine of the extension of the British Constitution to the American Colonies, which from their situation, could never be represented on equal terms in Parliament, was found to be useless for the protection of American rights, political or civil; and the doctrine that their rights were dependent on the Colonial Charters was found to be inadequate, for these Charters, while protecting the civil rights of the Americans to some extent, proceeded on the theory that they held all their political rights at the will or whim of Great Britain. The Americans felt and knew that they were entitled to political, as well as civil rights, and they all firmly believed that each so-called "colony" was a free state and subject to no external control beyond what was necessary to preserve their relationship with Great Britain on just terms to all the parties. This doctrine of free statehood as a universal right is, as I understand it, the central idea of the Declaration.

Assuming this to be the central idea, let us see how this idea is reached; and for that purpose, let us notice the exact language of the Declaration. The first paragraph reads:

> When in the course of human events, it becomes necessary for one people to dissolve the political bands which have con-

nected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

The "causes of separation" are prefaced by a number of propositions determining the nature of the "political bands" by which one people may be "connected with" another. These propositions are all rules of human conduct, and are therefore principles of law, though they are called "self-evident truths." This part of the Declaration reads:

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."

The conception of the universal right of free statehood is reached, in the Declaration, through a series of three propositions, each stated to be self-evident, and yet all forming a sequence. The basal proposition is, that "all men are created equal." Rufus Choate and John James Ingalls have declared this proposition and the succeeding one that "all men are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness," to be "glittering generalities." Abraham Lincoln, on the other hand, in his speech at Gettysburg, at the most

solemn and stirring moment in the country's history, declared that the proposition that all men are created equal was the foundation-idea of the nation, to which it was dedicated by the Fathers.

There are, it is to be believed, many who will be ready and willing to accept as true the statement, which every student of political history must admit to be true, that the philosophy of the American Revolution was a religious philosophy. It is indeed perhaps not too much to say that the period of the American Revolution was the period in which both political and religious thinking reached the highest point, and that there is no question of government which has since arisen which was not either solved by the Revolutionary statesmen or put in the process of solution.

The political philosophy of the American Revolution has long been confused with that of the French Revolution. As matter of fact, they stand at opposite poles. Our philosophy was religious, the French non-religious.

From the earliest times, the political philosophy of the people of America was directly connected with the religious and political philosophy of the Reformation. The essence of that philosophy was that man was essentially a spiritual being; that each man was the direct and immediate creature of a personal God, who was the First Cause; that each man as such a spiritual creature was in direct and immediate relationship with God, as his Creator; that between men, as spiritual creatures, there was no possibility of comparison by the human mind, the divine spark which is the soul being an essence incapable of measurement and containing possibilities of growth, and perhaps of deterioration, known only to God; that therefore all men, as essentially spiritual beings, were equal in the sight of all

other men. Luther and Calvin narrowed this philosophy by assuming that this spiritual nature and this equality were properties only of professing Christians, but Fox, followed by Penn, enlarged and universalized it by treating the Christian doctrine as declaratory of a universal truth. Penn's doctrine of the universal "inner light," which was in every man from the beginning of the world and will be to the end, and which is Christ,—according to which doctrine every human being who has ever been, who is, or who is to be, is inevitably by virtue of his humanity, a spiritual being, the creature of God, and, as directly and immediately related spiritually to Him, the equal of every other man,—marked the completion of the Reformation.

According to this theory, the life of animals who, being created unequal, are from birth to death engaged in a struggle for existence in which the fittest survives, is eternally and universally differentiated by a wide and deep chasm from the life of men, who, being created equal, are engaged in a struggle against the deteriorating forces of the universe in which each helps each and all, and in which each and all labor that each and all may not only live, but may live more and more abundantly.

According to this theory, also, the glaring inequalities of physical strength, of intellectual power and cunning, and of material wealth, which are, on a superficial view, the determining facts of all social and political life, are merely unequal distributions of the common wealth and each person is considered to hold and use his strength, his talents and his property for the development of each and all as beings essentially equal.

According to this theory, also, there is for mankind no "state of nature" in which men are equally independent and equally disregardful of others, which by

agreement or consent becomes a "state of society" in which men are equally free and equally regardful of others, but the "state of nature" and the "state of society" are one and the same thing. Every man is regarded as created in a state of society and brotherhood with all other men, and the "state of nature,"—man's natural estate and condition,—is the "state of society."

Were anyone asked to sum up in the most concise form possible the ultimate doctrine of the Reformation, he could, perhaps, epitomize it no more correctly than by the single proposition, "All men are created equal." This doctrine of human equality arising from common creation, growing out of Lutheranism and Calvinism through the intellectual influence of Penn, and the broadening effect of life in this new and fruitful land, underlay all American life and institutions.

One of the results of this final theory of the Reformation was the conception, by certain devout men and great scholars, of a "law of nature and of nations," based on revelation and reason, which was universally prevalent, and which governed the relations of men, of communities, of states and of nations. Out of this there had then emerged the conception which has now become common under the name of International Law, which treats of the temporary relations between independent states. But the conception of the "law of nature and of nations" was, as has been said, vastly wider than this. It was a universal law governing all possible forms of human relationship, and hence all possible relations between communities and states, and therefore determining the rights of communities and states which were in permanent relationship with one another. Based on the theory of the equality of all men by reason of their common creation, it recognized just public

sentiment as the ultimate force in the world for effectuating this equality, and considered free statehood as the prime and universal requisite for securing that free development and operation of public sentiment which was necessary in order that public sentiment might be just.

While this philosphy of the Reformation was thus extending itself in America, both among the Governments and the people, and in Europe among the people, the Governments of Europe, though not recognizing the existence of any "law of nature and of nations" whatever, were nevertheless acting on the basis that such a law did exist and was based on the proposition that all men are created unequal, or that some are created equal and some unequal. The alleged superior was sometimes a private citizen, sometimes a noble, sometimes a monarch, sometimes a government, sometimes a state, sometimes a nation. The inferior was said to be "dependent" upon the superior—that is, related to him directly and without any connecting justiciary medium, so that the will of the superior controlled the will and action of the inferior.

We discover, then, from an examination of the circumstances surrounding the Declaration of Independence, a most interesting situation. A young nation, separated by a wide ocean from Europe, settled by men who were full of the spirit of the Reformation, deeply convinced, after a national life of one hundred and fifty years, that these principles were of universal application, were suddenly met by a denial of these principles from the European State with which they were most intimately related. This denial was accompanied by acts of that State which amounted to a prohibition of the application of these principles in American political life. This European State was indeed the

mother-country of America, and the Americans were bound to their English brethren by every tie of interest and affection. The Americans were only radical Englishmen, who gloried in the fact that England of all the countries of Europe had gone farthest in accepting the principles of the Reformation, and who had emigrated reluctantly from England, because they were out of harmony with the tendency of English political life to compromise between the principles of Mediævalism and the principles of the Reformation. The Declaratory Act of 1766 brought clearly into comparison the political system of America, opposed to the political system of Europe. It was inevitable from that moment that the American System, based on the principles of the Reformation in their broadest sense and their most universal application and briefly summed up in the proposition that "all men are created equal," must conquer, or be conquered by, the European System, based either on the principles of Mediævalism, summed up in the proposition that "all men are created unequal," or on a compromise between the principles of Mediævalism and the Reformation, summed up in the proposition that "some men are created equal, and some unequal."

The most reasonable interpretation, as it seems to me, of the statement that "all men are created equal" is, as I have said, that it is, and was intended to be, an epitome of the doctrine of the Reformation. There will be those who will scoff at the suggestion that a political body like the Continental Congress should have based the whole political life of the nation upon a religious doctrine. But it is to remembered that the Continental Congress was not an ordinary political body. It was the most philosophic and at the same time the most religious and the most intellectually untrammeled

body of men who ever gathered to discuss political theories and measures. Meeting under circumstances where weakness of resources compelled the most absolute justness in their reasons for taking up arms, they must have discussed their positions from the standpoint of morality and religion. John Adams tells that one of the main points discussed at the opening of the Continental Congress, when they were framing the ultimatum which finally took the form of the Fourth Resolution was, whether the Congress should "recur to the law of nature" as determining the rights of America. He says that he was "very strenuous for retaining and insisting on it," and the Resolutions show that he succeeded, for they based the American position on the principles of "free government" and "good government," recognized that the "consent" of the American Colonies to Acts of the British Parliament justly regulating the matters of common interest was a "consent from the necessity of the case and a regard to the mutual interests of both countries," and claimed the rights of "life, liberty and property" without reference to the British Constitution or the American Charters. Jefferson tells us that throughout the period of nearly two years which intervened between the assembling of the Congress and the promulgation of the Declaration, the principles of the law of nature and of nations set forth in the preamble were discussed, and that when he wrote the preamble he looked at no book, but simply stated the conclusions at which the Congress, with apparently practical unanimity, had arrived.

But it is not necessary, it would seem, to resort to to external evidence to prove that the Declaration is based on the doctrine of the Reformation. In several places it seems to expressly declare that the rights claimed by America are claimed under the law of nature

and of nations based on divine revelation and human reason.

From the doctrine of equality arising from the common creation of all men by a personal Creator to whom all were equally related, it is declared by the Declaration to follow as a "self-evident" truth that there are certain rights, which are attached to all men by endowment of the Creator as being the correlative of the unalienable needs of all men, and which inasmuch as they arise from the universal limitations which the Creator has imposed, are as unalienable as the needs themselves. These unalienable rights are declared to be the rights of life, liberty, and the pursuit of happiness.

The doctrine of unalienable rights, necessarily supposes a universal law, for the conception of law must precede the conception of right. This law, as conceived of by the Declaration is a common and universal law.

In the first part of the preamble this universal common law is spoken of as "the law of Nature and of Nature's God." Inasmuch as the rights claimed are those which depend for their existence upon revelation as well as reason, it is evident that this common and universal law to which the Declaration appeals, is the "law of nature and of nations," of the scholars of the Reformation, which was conceived of as based on revelation and reason, and as governing every relationship of men, of bodies corporate, of communities, of states, and of nations. Out of this conception there had already grown that great division of the law which deals with the temporary relations between independent states, which we now call International Law.

Having thus established the doctrine of unalienable rights, based on a universal common law of nature and of nations, which all men, all bodies corporate, all communities, all governments, all states, and all nations

were bound to enforce, the Declaration proceeds to a consideration of the forms, methods, and instrumentalities by which these unalienable rights are to be secured.

It declares that the primary instrumentality by which these rights are secured, are governments "deriving their just powers from the consent of the governed." Contrary to the usual interpretation, the Declaration does not state that government is the expression of the will of the majority. Governments, it is declared, are instituted to "secure" the "unalienable rights" of individuals. The will of the majority, of course, is quite as likely to destroy as to secure the unalienable rights of individuals. Moreover, the Declaration says merely that "governments are instituted among men"—not that men universally institute their own governments. The whole statement that the governments which are instituted among men to secure the unalienable rights of individuals, universally "derive their just powers from the consent of the governed," is inconsistent with the proposition that governments are the expression of the mere will of the majority, for it is only their "just powers" that governments "derive" from "the consent of the governed," and the will of the majority may be just or unjust. The expression "deriving their just powers from the consent of the governed" seems to me most probably to be an epitome and summary of the two fundamental propositions of the law of agency —"*Obligatio mandati consensus contrahentium consistit*, a free translation of which is "The powers of an agent are derived from the consent of the contracting parties," and *Rei turpis nullum mandatum est*, a free translation of which is "No agent can have unjust powers." On this interpretation the meaning of the whole sentence "that to secure these rights, governments are instituted among men, deriving their just powers from the consent

of the governed," is, it would seem, that there is a universal right of all communities to have a government of a kind best adapted for the securing of the unalienable rights of individuals, instituted either by their own selection or by the appointment of an external power, and that all governments, however instituted, are universally the agents of the governed to secure these rights. Government is thus declared not to be the expression of the will of the majority, but the application of the just public sentiment justly ascertained through forms best adapted for this purpose.

The free statehood which is claimed in the concluding part of the Declaration to be the right of the Colonies is by the Declaration based on the philosophical declarations of the preamble. The particular proposition which bears upon the right of free statehood is evidently the one which declares that, "to secure these [unalienable] rights [of individuals], governments are instituted among men, deriving their just powers from the consent of the governed." The intermediate propositions, as the result of which the universal right of free statehood follows from this proposition, are, it would seem, these: If government is the doing of justice according to public sentiment, government is the expression and application of a spiritually and intellectually educated public sentiment, since, although a rudimentary knowledge of what is just is implanted in every human being, a full knowledge, of what is just, comes only after a course of spiritual and intellectual education. Hence it follows that the forms and methods of government should be such as are adapted to such spiritual and intellectual education. Education takes place by direct personal contact, and can be best accomplished only through the establishment of permanent groups of individuals who are all under the same conditions. The formation

and expression of a just public sentiment, therefore, requires the establishment of permanent groups of persons, more or less free from any external control which interferes with their rightful action, under a leadership which makes for their spiritual and intellectual education in justice. Such permanent groups within territorial limits of suitable size for developing and expressing a just public sentiment, are free states. Territorial divisions of persons set apart for the purpose of convenience in determining the local public sentiment, regardless of its justness or unjustness, are not states, but are mere voting districts. Just public sentiment, for its expression and application, requires the existence of many small free states, disconnected to the extent necessary to enable each to be free from all improper external control in educating itself in the ways of justice; mere public sentiment, for its expression and application, requires only the existence of a few great states divided into voting districts, each district being under the control of the Central Government, which is to it an external control. Just public sentiment, as the basis of government, is a basis which makes government a mighty instrument for spirituality and growth; mere public sentiment, regardless of its justness or unjustness, as the basis of government, is a basis which makes government a mighty instrument for brutality and deterioration. Human equality, unalienable rights, government according to just public sentiment, and free statehood, are inevitably and forever linked together as reciprocal cause and effect.

The ultimate meaning of the expression "that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed," seems therefore to be that by the common law of nature and of nations there is a universal

right of free statehood which pertains to all communities on the face of the earth within territorial limits of suitable size for the development and operation of a just public sentiment.

So complete and universal are the principles of government by just public sentiment and of free statehood that, according to the Declaration, even when all the people of a free state are meeting together to alter or abolish a form of government which has become destructive of the ends of its institution, as it is declared they may rightfully do, their right to form a new government is not absolute so that they can rightfully do whatever the majority wills, but is limited by this universal common law, so that they can rightfully institute only a new form of government whose foundation principles and mode of organization are such "as to them shall seem most likely to effect their safety and happiness"—that is, to secure the unalienable rights of individuals to life, liberty, and the pursuit of happiness.

The declaration of the universal right of free statehood is accompanied, in the Declaration, by the claim that the Colonies, as free states, had always been in political "connection" with the State of Great Britain. The concluding part of the Declaration reads:

> We, therefore, . . . declare that these United Colonies are, and of right ought to be, free and independent states, . . . and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.

In this it was necessarily implied that the Colonies had always been free states or free and independent states, and that, by the Declaration, at most their right of independent statehood came into existence; that they had theretofore at all times been in political con-

nection, either as free states under the law of nature and of nations, or as free and independent states by implied treaty, with the free and independent State of Great Britain; that the dissolution of the connection had not come about by an act of secession on their part, but was due to the violation, by the State of Great Britain, either of the law of nature and of nations, or of the implied treaty on which the political connection was based.

The term "connection" was an apt term to express a relationship of equality and dignity. "Connection" implies two things, considered as units distinct from one another, which are bound together by a connecting medium. Just connection implies free statehood in all the communities connected. Union is a form of connection in which the connected free states are consolidated into a unity for the common purposes, though separate for local purposes. Merger is the fusion of two or more free states into a single unitary state. Connection between free states may be through a legislative medium, or through a justiciary medium, or through an executive medium. The connecting medium may be a person, a body corporate, or a state. States connected through a legislative medium, whether a person, a body corporate or a state, and whether wholly external to the states connected or to some extent internal to them, whose legislative powers are unlimited or which determines the limits of its own legislative powers, are "dependent" upon or "subject" to the will of the legislative medium. Such states are "dependencies," "dominions," "subject-states," or more accurately "slave-states,"—or more accurately still, not states at all, but mere aggregations of slave-individuals. States connected through a legislative medium, whether a person, a body corporate, or a state, and whether wholly ex-

ternal to the states connected or in part internal to them, whose legislative powers are granted by the states and which have only such legislative powers as are granted, are in a condition of limited dependence, dominion, and subjection; but their relationship is by their voluntary act and they may, and by the terms of the grant always do to some extent control the legislative will to which they are subject and on which they are dependent. Where states are connected or united through a justiciary medium, whether that justiciary medium is a person, a body corporate, or a state, all the states are free states, their relationships being governed by law. Where states are connected through an executive medium, whether that executive medium is a person, a body corporate, or a state, all the states are free and independent states, and each acts according to its will. All connections in which the legislative medium,—whether a person, a body corporate or a state, and whether wholly external to the states connected, or to some extent internal to the states connected,—has unlimited legislative powers or determines the limits of its own legislative powers, are fictitious connections, the relationship being really one which implies "empire" or "dominion" on one side, and "subjection" or "dependence" on the other. Such connections are properly called "empires" or "dominions." So also all connections in which the only connecting medium is a common executive, whether a person, a body corporate or a state, are fictitious connections, the relationship being one of "permanent alliance" or "confederation" between independent states. Such connections are properly called "alliances" or "confederations." The only true connections are those in which there is a legislative medium, whether a person, a body corporate or a state, whose legislative powers are limited, by agreement of

the connected states, to the common purposes, and those in which there is a justiciary medium, whether a person, a body corporate, or a state, which recognizes its powers as limited to the common purposes by the law of nature and of nations, and which ascertains and applies this law, incidentally adjudicating, according to this law, the limits of its own jurisdiction. Just connections tend to become unions, it being found in practice necessary, for the preservation of the connection in due order, that the power of limited legislation for the common purposes and the power of adjudicating and applying the law for the common purposes should extend not only to the states, but to all individuals throughout the states.

Thus "dependence," as a fictitious and vicious form of connection, is, it would appear, forever opposed to "connection" of a just and proper kind. If it were attempted to sum up the issue of the American Revolution in an epigram, would not that epigram be: "'Colony,' or 'Free State?' 'Dependence,' or 'Just Connection?' 'Empire,' or 'Union?'"

According to the opinion of the Revolutionary statesmen, as it would seem, a universal right of free statehood does not imply a universal right of self-government. Statehood and self-government are two different and distinct conceptions. The Americans claimed the right of free statehood as a part of the universal rights of man, but they claimed the right of self-government because they were Englishmen trained by generations of experience in the art of self-government and so capable of exercising the art. A state is not less or more a free state because it has self-government. It is a free state when its just public sentiment is to any extent ascertained and executed by its government,—however that government may be instituted,—free from the

control of any external power. It does not prevent a region from being a free state that its government is wholly or partly appointed by an external power, if that government is free from external control in ascertaining and executing the just local sentiment to any extent. Nor does it interfere with the right of free statehood when an external power stands by merely to see that the local government ascertains and executes the just local sentiment to a proper extent. The external power in that case is upholding the free statehood of the region. It stands as surety for the continuance of free statehood.

The right of self-government, according to this view, is a conditional universal right of free states. When a community, inhabiting a region of such territorial extent that it is not too large to make it possible for a just public sentiment concerning its affairs to be developed and executed, and not so small as to make it inconvenient that it should be in any respect free from external control, is of such moral and intellectual capacity that it can form and execute a just public sentiment concerning its internal affairs and its relations with other communities, states and nations, it has not only the right of free statehood,—that is, of political personality,—which is of universal right, but also the right of self-government. The right of such a free state to self-government is complete if there be no just political connection or union between it and other free states, or partial, if such a just connection or union exists, being limited, in this latter case, to the extent necessary for the preservation, in due order, of the connection or union.

Independence was regarded apparently also, by the Declaration, when it declared the Colonies to be "free and independent states," to be a right superadded to

the right of free statehood in some cases, and therefore to be a conditional universal right of free states —that is, a right universally existing where the conditions necessary to independence — great physical strength, and great moral and intellectual ability— exist.

The Colonies regarded themselves as free states in such a just and rightful connection with the free and independent State of Great Britain as to form with it a union. From this it followed, inasmuch as this connection and union was conceived of as existing under a universal common law, that the State of Great Britain, through its Government, was the justiciary medium which connected the free states of that which they conceived of as the British-American Union, and as such applied the principles of this universal common law for preserving and maintaining in due order the connection and union. There, therefore, resulted the conception of Great Britain as what may perhaps be called "the Justiciar State" of this British-American Union. If we were to use the exact language of the Revolution, it would probably be more proper to speak of Great Britain as "the Superintending State" of the British-American Union, as the power of Great Britain over the Colonies was generally spoken of by the Americans as "the superintending power." Lord Chatham used this expression in his famous bill introduced in the House of Lords. The expression "Justiciar State," however, seems to be more scientifically correct. A Justiciar was an official who exercised the power of government in a judicial manner. His power was neither strictly legislative, nor strictly executive, nor strictly judicial, but was complex, being compounded of all three powers, so that his executive action, taken after judicially ascertaining the facts in each case and

applying to them just principles of law, resulted in action having the force of legislation.

The Revolutionary statesmen have left a very considerable literature showing their views concerning the nature of the right of a state to be the Justiciar State of a Union of States, and concerning the powers which a Justiciar State may rightfully exercise.

Arguing on the same basis as that adopted by them regarding the right of self-government and independence, it appears that they considered the right of a state to act as Justiciar for other states to be a right superadded to the right of self-government and independence in some cases—that is, that justiciarship is a conditional universal right of self-governing and independent states, the conditions necessary to its existence being great physical strength, a judicial character and a capacity for leadership.

The power exercised by a Justiciar State in a Justiciary Union, they recognized as being neither strictly legislative, nor strictly executive, nor strictly judicial, but a power compounded of all these three powers. They considered that it was to be exercised for the common purposes after investigation by judicial methods; that the just public sentiment of the free states connected and united with the Justiciar State was to be considered by it in the determination of the common affairs; and that the action of the Justiciar State was to result, after proper hearing of the free states and all parties concerned, in dispositions and regulations made according to just principles of law, which were to have the force of supreme law in each of the connected and united free states respectively. This kind of power, which the Fathers called "the superintending power" or "the disposing power" under the law of nature and of nations, and which may be called,

using an expression now coming into use, "the power of final decision," or more briefly "the justiciary power," being neither legislative, executive, nor judicial, but more nearly executive than legislative, the more conservative among them considered might be exercised, consistently with the principles of the law of nature and of nations, either by the Legislative Assembly of the Justiciar State or by its Chief Executive, advised by properly constituted Administrative Tribunals or Councils; the action of the Legislative Assembly superseding that of the Chief Executive in so far as they might be inconsistent with each other. This right of both the Legislative Assembly and of the Chief Executive, properly advised, to exercise the powers of the Justiciar State—the former having supreme, and the latter superior justiciary power,—under the law of nature and of nations, is, I believe, also recognized by our Constitution, as I have elsewhere attempted to show.

Of course there must be conditions of transition where the relations between free states which would normally be in union, or between detached portions of what would normally be a unitary state, temporarily assume a form which is partly one of union or merger, and partly of dependency. The justification of all such forms of relationship must, it would seem, be found in the fundamental right which every independent state, whether a justiciar state or not, has to the preservation of its existence and its leadership or judgeship—that is, in the right of self-preservation, which, when necessary to be invoked, overrules all other rights. On this theory must, it would seem, be explained the relations between the American Union and its Territories, between Germany and Alsace-Lorraine, and between England and Ireland. On this theory of self-preservation, also, must, it would seem, be explained the

permanent relationship of dependency which exists between the District of Columbia and the American Union—such dependency being necessary to the preservation of the life of the Union.

Out of the conception of a universal common law of nature and of nations which governs all human acts and relationships,—and therefore all the acts and relationships of states and nations as well as of men, bodies corporate and communities,—there has arisen and at the present time exists, a science of the universal and common law of the state, called the Science of the Law of the State, which concerns itself with the internal relations of a state to its people, its bodies corporate and its communities, and a science of the universal and common law of independent states, called the Science of International Law, which concerns itself with the occasional and temporary relations of independent states. The great field of law which concerns the permanent relations of free states is not yet covered by a recognized science. Must there not therefore emerge from this conception of a universal and common law of nature and of nations, a third science of law, covering this field, which will take as its basal proposition the doctrine that free statehood is the normal and rightful condition of all communities on the earth's surface within suitable limits for the formation of a just public sentiment, and which will concern itself with the permanent relations between free states? As such permanent relations must always be by just connection, either in its simple form or in the form of union, may not such a science of law, standing between the science of the Law of the State and the science of International Law, be called the science of the Law of Connections and Unions of Free States?

Taking the whole Declaration together, and reading

it in the light of the political literature which was put forth on both sides of the water between the years 1764 and 1776, it seems to be necessary to conclude that the views of the most conservative of the American statesmen of the period concerning the connection between Great Britain and the Colonies were these:

They considered, as I interpret their language, that the connection between the free and independent State of Great Britain, and the American Colonies, as free states, had existed and of right ought to have existed, according to the principles of the law of nature and of nations —that law being based on principles opposed to the principles applied by the governments of Europe, and being thus what may be called a law of nature and of nations according to the American System. Had they used a more definite and scientific phraseology, it seems that their view would best be expressed by saying that they considered that the relationship between Great Britain and the Colonies had always existed according to the principles of the Law of Connections and Unions of Free States. They accordingly admitted, as I understand them, that Great Britain, as a free and independent state, had power, as Justiciar, over the American Free States, for the common purposes of the whole Union, to finally decide, by dispositions, ordinances and regulations having the force of supreme law, made through its Government after a judicial hearing in each case for the investigation of facts and the application to them of the principles of the Law of Connections and Unions of Free States, upon all questions of common interest arising out of the connection and union; and that each of the American Free States had power, through its Legislature, to legislate according to the just public sentiment in each, and the right to have its local laws executed by its Executive and interpreted

and applied by its Courts, free from all control by the State of Great Britain, except what was necessary to protect and preserve the Union.

In this view, the actions of the Americans show the evolution of a continuous theory and policy, and the application of a single American system of principles,—a system which was based upon free statehood, just connection and union. The British-American Union of 1763 was a Union of States under the State of Great Britain as Justiciar, that State having power to dispose of and make all rules and regulations respecting the connected and united free states, needful to protect and preserve the connection and union, according to the principles of the Law of Connections and Unions. The dissolution of this Union, caused by the violation by the State of Great Britain of its duties as Justiciar State, gave a great impetus to the extreme states'-rights party, and the next connection formed,—that of 1778 under the Articles of Confederation,—was not a Union, the Common Government (the Congress) being merely a Chief Executive. Such a connection proving to be so slight as to be little more than a fiction, they formed, under the Constitution of 1787, the only other kind of a union which appears to be practicable, namely, a union under a common government which was a Chief Legislature for all the connected and United States by their express grant, and whose powers were expressly limited, by limitation in the grant, to the common purposes of the whole connection and union of free states.

If the Constitution, in defining what are the common purposes of the Union and what the local purposes of the States of the Union, is declaratory of the principles of the Law of Connections and Unions of Free States, as it seems not unreasonable to hold, the Limited Legislative Union formed under the Constitution may per-

haps be considered, in view of the supremacy of the Judiciary, as Guardians of the Constitution, over the Limited Legislature, as a species of Justiciary Union.

Moreover, if in what has been said we are correct, the relationship at present existing between the American Union and the Insular regions, is that of *de facto* Justiciary Union, and the American Congress, under the lead of President McKinley and President Roosevelt, has acted, with reference to these regions, according to the principles of the American system. The American Union, through President McKinley, has declared itself to be "a liberating, not a conquering nation," and has recognized the people of Hawaii, Porto Rico and the Philippines as each having a separate and local citizenship, thus recognizing each of these regions as a *de facto* free state connected with the American Union. The action of the American Union extends to the regulation of the action of individuals in these free States, so that a Greater American Union of Free States exists *de facto*. To bring into existence a Greater American Union *de jure*, it needs, first, the public and express recognition by the American Union of itself as the Justiciar State, and of each of the separate Insular regions within proper territorial limits, as a Free State in just connection and union with the American Union; and, secondly, the establishment by the American Union of the necessary Advisory Council for investigating facts and for advising the President before he, on behalf of the American Union as Justiciar State, exercises his superior justiciary powers, and for advising the Congress before it, in the same behalf, exercises its supreme justiciary powers. Councils suitable for advising the local Governors, when they, on behalf of the American Union as Justiciar State, exercise their inferior justiciary powers, already exist. Of such a Greater American

Union, the present American Union would be the Supreme Justiciary Head, with power to finally determine the questions arising out of the relationship, not by edict founded on will and force, but by decision carefully made in each case after ascertaining the facts in each case and applying to them the principles of the Law of Connections and Unions properly applicable to them.

Is not this theory the true *via media?* The theory of the automatic extension of the constitution of a state over its annexed insular, transmarine and transterranean regions which from their local or other circumstances can never equally participate in the institution and operation of its government, in some cases protects individual rights, but it takes no account of the right of free statehood, which is the prime instrumentality for securing these rights. The theory of a power over these regions not regulated by a supreme law, is a theory of absolute power over both individuals and communities in these regions—a theory which implies an absence of all rights. The theory of a power over these regions based on the principles of the Law of Connections and Unions, granting that this law is itself based on the right of human equality, protects the rights of persons, of communities, of states, and of nations. On this theory the "Territory Clause" of the Constitution recognizes the Law of Connections and Unions as determining the relationship between the American Union and the Insular regions—"needful" rules and regulations being those which are adapted to accomplish the end desired and which are consistent with the principles of the Law of Connections and Unions as declared in the Declaration of Independence. On this theory, the doctrine of the Supreme Court that the civil rights of individuals in cases growing out of our rela-

tions with our Insular brethren are protected by "the fundamental principles formulated in the Constitution," or by "the applicable provisions of the Constitution," is translated into the doctrine that these individual and civil rights are protected by the principles of the Law of Connections and Unions of Free States, as these principles are formulated in the Constitution and as they are disclosed by an examination of the applicable provisions of the Constitution, and that not only are these civil rights protected by this law, but also the political rights of all the parties to the relationship. On this theory, the jurisdiction of the Supreme Court continues to be exactly the same as at present. The necessary Advisory Councils for ascertaining the just political relations between the American Union and the Insular regions and for determining the political rights growing out of that relationship, would not in the least interfere with the Supreme Court in the exercise of its functions. They would supplement that Court, which now protects the civil rights of all concerned through its adjudications in civil cases, by assisting the Congress and the President to protect and preserve the political rights of all concerned through dispositions and needful rules and regulations in political cases.

By adopting this theory of the Reformation and the American Revolution, may not the American System extend indefinitely without danger to America herself? There would be no domination, no subjection. The same Law of Connections and Unions would extend over and govern throughout the whole Greater American Union. This Greater American Justiciary Union would be but a logical application of the principles underlying the American Legislative, Executive, and Judicial Union formed by the Constitution of the United States.

It would not be the Constitution which would follow the flag into the regions which America has annexed to herself, but the Law of Connections and Unions, which is a part of the Law of Nature and of Nations according to the American System.

I recur, therefore, to my first proposition and submit to your judgment whether the terms "colony," "dependence," and "empire," on the one hand, and the terms "free state," "just connection," and "union," on the other, are not the symbols of two great and fundamentally opposed systems of politics—the one European, and the other American; whether the American terms and the American System are not capable of being applied universally and beneficently, in the way pointed out above, throughout all places outside the present Union which are within the limits of its justiciary power; and whether, if they are capable of this application, it is not our duty, both logically and ethically, to use the American terms in describing the relations between us and our Insular brethren, applying at the same time the principles of the American System, and thus calling into existence a Greater American Union.

THE DEVELOPMENT OF THE AMERICAN DOCTRINE OF JURISDICTION OF COURTS OVER STATES

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BY the Articles of Confederation, the American States made the United States, in Congress assembled, "the last resort on appeal" in all disputes between them, and authorized the Congress, upon the complaint of any State against another, to institute a special tribunal, according to a method prescribed by the Articles, for the final decision of the dispute. By the Constitution, the people of the United States and the States of the Union established a Supreme Court of the United States and made it a tribunal for the judicial settlement of all interstate and international disputes in which the United States or the States of the Union might be involved with each other or with foreign states, and which were capable of being settled by the exercise of "the judicial power" of the United States. By these two documents, therefore, it was recognized as an American doctrine that disputes between states may, under some circumstances, properly be settled according to the decision of courts—or, to put it inversely, that courts may, under some circumstances, properly have jurisdiction over states.

Now that the states of the society of nations are on the point of establishing a Court of Arbitral Justice for the settlement of such international disputes as are ca-

pable of judicial determination, it becomes interesting to discover the process by which the Supreme Court of the United States has been evolved. It may be that by tracing this line of development, some light may be thrown upon the questions which are now presenting themselves in regard to the proposed international court.

The institutions of a people are in part the expressions of their political, social, and economic beliefs, and in part the result of experiments made by them and of improvements upon institutions which have stood the test of experiment. It is necessary, therefore, in this inquiry, to examine first the nature of the political, social, and economic beliefs of the founders of the American commonwealth; then, to investigate their experience in the working of those institutions set over them by England as their mother country, or established by themselves, which bore an analogy to the Supreme Court of modern times, and to ascertain the process by which these early institutions were improved and adapted to the changing environment.

In our search for the political doctrine held by the American colonists which may reasonably be thought to have manifested itself in our Supreme Court, we perhaps may find a clue in a remark made by Grotius in his "Three Books of Peace and War." Describing the power which a State ought to exercise over its colonies (lib. i, cap. iii, sec. 21), he says that while the Latins described the power of the mother city or state by the word *imperare*, to command, and regarded it as having the *imperium*, or empire, over the colonies, the Greeks "more modestly" described the power of the mother city by the word τάσσειν, to dispose or set in order, and regarded the mother city as having the ἡγεμονία that is, the hegemony, leadership in judgment or su-

preme jurisdiction. The American colonists regarded England, their mother country, as the Greek colonists regarded their mother city. They recognized that England had a leadership in judgment and hence a supreme jurisdiction over the Colonies for the purpose of disposing and setting in order their affairs to the extent that might be necessary for the common defense and for the general welfare, but they denied its power to command. They insisted that the execution of the judgments of the mother country was of right in the Colonies and that, in extreme cases, where its decisions were palpably unjust, the Colonies might refuse to adopt or execute them.

The American colonists went farther, and denied to their own governments and to all governments the power of absolute command, holding that government in every form is essentially leadership in judgment. To place it beyond doubt that their governments did not have the *imperium* of the Latins, but only the hegemony of the Greeks, they adopted the custom of binding their governments by written constitutions regarded as emanating from the people, limiting the powers which the government was authorized to exercise and placing it in the position of an authorized agent of the people. Their representative assemblies they called, in some cases, general courts; and they held the members of such assemblies responsible as members of a supreme tribunal. Every act of government they regarded as an act of judgment, and they considered that the persons appointed to govern were but the leaders in the judgment. They held that the final judgment rested in the whole people, who confirmed by their acquiescence and conformity those acts of government which by common consent were regarded as necessary and just, and who ultimately nullified such acts of govern-

ment as by common consent were regarded as unnecessary and unjust. With regard to every governmental act, the question in their minds was, whether the act in question appealed to their reasons and consciences as necessary and just under the circumstances. If the general consensus was that the act of government was necessary and just, the people executed it as a matter of choice and free will. Governmental commands and prohibitions, in their view, thus derived their force from the judgments on which they were based and on the general acquiescence in the judgment as necessary and just.

The social ideas of the American colonists were based upon Christianity. The people were thus at the same time individualists and humanitarians and sought to find the middle ground between selfishness and altruism. They believed in the equality of all men before God by reason of the common and equal creation of all men by God, and held to the conception of a law of nature imposed by God, which is supreme over all human action and relationship and to which all men, states, and peoples are equally subject. This law of nature was to their mind composed of those principles of natural justice, based primarily on the equal right and duty of self-protection and self-preservation, which are implanted in man by God, and which are in part revealed and in part discoverable by the enlightened reason and conscience. All governmental acts they believed were to be judged by the people according to this supreme law.

The economic ideas of the American colonists were similar to their social ideas. As individualists they opposed monopoly and caste and believed in the fundamental rights of self-protection and self-preservation, called the rights of life, liberty, and property. As hu-

manitarians they believed that trade, commerce, and intercourse ought to be free and universal, limited only by the necessities of self-protection and self-preservation.

Holding these views, the American colonists regarded the colonies as commonwealths and free states, and at the same time thought it not inconsistent that these free states and commonwealths should be parts of the English empire and the English commonwealth. They willingly assented to those provisions of the colonial charters which required that the governmental acts of the colonies should be consistent and harmonious with the governmental acts of England. The effect of this was, to make the law of England a supreme law of the colonies, governing, not only the people of the colonies, but the colonies themselves. But to this law they could not yield absolute supremacy consistently with their conception of a supreme and universal law of nature emanating from God. They therefore regarded the English empire and commonwealth, and each of the constituent states, as subject in the first instance to the law of England as a supreme law, but as also subject in the last resort to the law of nature. The English and colonial courts and governments also recognized the law of nations, composed of the principles of international conduct and relationship agreed upon by independent states and manifested in treaties or in their political action, though even this law the American colonists regarded as subordinate to the law of nature. Disputes between the states forming the English empire and commonwealth, involving questions capable of judicial determination, were thus to be decided by courts. The local law of the colony was applied in cases where it was solely applicable, and the law of England or the law of nations were also applied where applicable, the one or the other being supreme according

to the nature of the case; the law of nature governing all cases not covered by the other laws and being supreme over all.

Realizing, however, that there were disputes between states, as between individuals, involving dignity or vital interests, which were not susceptible of decision by the cold and dispassionate methods of investigation and adjudication, and which could only be settled by methods taking into account passions, sentiments and prejudices, they believed that the settlement of disputes between the states composing the English empire and commonealth ought to be in the charge of a specially constituted tribunal fitted by training to act judicially where the judicial method was applicable and to act diplomatically where the judicial method was inapplicable. Yielding reasonable deference to England as the mother country, they were willing to entrust her with the duty of establishing and maintaining such a tribunal. During the colonial period, the people of the colonies consented that the arbitration or adjudication of disputes between the colonies or between one or more of the colonies and England should be conducted before tribunals in England established by the English government for that purpose. When by the Revolution there ceased to be a mother country to act as arbitrator and judge between the American States, it was inevitable that their political, social, and economic beliefs should find expression in a system of their own for carrying on such arbitrations and adjudications.

Having thus attempted to form some conclusion concerning the development of the doctrine of jurisdiction of courts over states as a matter of political, social and economic belief, it becomes necessary to examine the experience of the Americans in the work-

ing of institutions which culminated in the establishment by them of the Supreme Court of the United States.

It may be objected that such an investigation is without practical value as bearing upon the institution of the proposed Court of Arbitral Justice, because the institutions of which the Americans had experience were those which existed under a political union formed by England and the Colonies and held together by the power of England. Such institutions, it may be urged, have no resemblance to or bearing upon the institutions which a body of independent states would find it for their interests to form.

It must indeed be admitted that the tribunals in England which settled the disputes of the American Colonies were the product of English statesmanship supported by English force, and that these institutions were accepted by the colonies and in no sense created by them. At the same time, it is to be remembered that all unions or combinations of individuals or states arise out of the same circumstances and have the same objects—they are for the common defense and for the general welfare. It matters little from what standpoint each of the parties enters upon the negotiations. Whether they start from a position of assumed equality or from a position of assumed inequality, the union or combination will tend to perfect itself by conforming to the facts as they exist, and the institutions of the union or combination will tend to take the form which best suits the needs of all the parties. In spite, therefore, of the fact that the Supreme Court of the United States had its origin in the institutions of the English empire and commonwealth and the British empire, and exists today as an institution of the American Union, it by no means follows that American experience of these

institutions may not be of value at this time to the states of the society of nations.

In the English realm and empire, from the earliest times until the Revolution of 1641, the tribunal known as "the King (or the Queen) in Council" played the most important part. From 1660 until about 1770, it had a settled and peculiar jurisdiction, as opposed both to the jurisdiction of the body known as the Parliament, established in 1295, composed of King, Lords, and Commons, and to that of the ordinary courts of justice of the realm. The King in Council was legally the King advised by his Privy Council. This council was composed of men selected by the King for their social influence and their expertness in statesmanship, law, and economics. By their advice the King made treaties with independent states, exercised jurisdiction over annexed countries, and carried on the government of the realm according to customary principles and according to Parliamentary acts.

During the reign of Elizabeth, the government of England was carried on almost entirely by the Queen in Council. Few Parliaments were held, and the action of those which were held was largely devoted to registering the decrees of the Queen in Council and levying taxes to be expended as the Queen in Council might direct.

An examination of the charters of discovery granted by Queen Elizabeth to Sir Humphry Gilbert and Sir Walter Raleigh shows that it was her purpose, had colonies been established under these charters, to govern them by herself, advised by her Privy Council. Judging from the system pursued by Elizabeth and her predecessors in the case of Ireland and Jersey, there would have been a Governor and Privy Council in each of the American Colonies, subordinate to and in corre-

spondence with the Queen in Council. The bond of union between England and the Colonies would have been considered to arise from the common allegiance of all English-born people, and their descendants, to the person of the reigning monarch. Under this system the Colonies and their citizens would have been subject to the Queen in Council as a supreme tribunal.

The system of government by councils which prevailed in England during Elizabeth's time was a favorite system at that time throughout Europe. The feudal system was on the point of giving place to the representative system, but during the last half of the sixteenth century there was a reaction towards the feudal system. Spain, the most successful colonizing power of that day, was governed by councils. Its relations with its colonies were in charge of a specially selected and distinguished body of men who formed the Council of the Indies, which was assisted by a subordinate Council of Trade. A similar system prevailed in Portugal. In the Empires of Venice and Genoa, then passing into decay, the relations with the oversea colonies and trading-posts had been in charge of a central tribunal.

When James VI of Scotland came to the throne of England as James I in 1603, after the death of Elizabeth, a new situation was beginning to be formed on the Continent of Europe. Spain and Portugal, claiming the whole world outside of Europe under Papal bull, were declining, and the northern powers of the Continent under the lead of Henry IV, King of France, were trying to arrange a European Concert to regulate Europe and all the rest of the world. The movement was ostensibly aimed against Spain and Austria, but it was evident that any Concert of the Continental powers must inevitably in the long run be turned against England. It became necessary for England, whose

trade was already almost strangled by hostile regulations of Continental powers, to gain colonies for itself in America and to hold them against any possible Continental coalition. A systematic plan of colonization was therefore entered upon in which the great lawyers of England, among them Coke, Bacon, and Popham, participated.

Just as these plans were being prepared, an event occurred in England which, as the Colonial documents and literature show, had a profound influence on the people of the American Colonies. This was the settlement of a dispute between England and Scotland according to a decision made by the judges of England. When King James became King of both countries, the question arose, what rights the citizens of the two states should have against each other while their peoples were thus united through the person of the King. Commissioners were appointed by the legislatures of the two states, and an agreement was reached except upon the question of what rights the citizens of Scotland should have in England, and vice versa. In 1604, the English House of Commons brought the negotiations to a temporary close by insisting that the rights of the Scots in England should be such only as they were entitled to according to the principles of law and established precedents. The House of Lords insisted upon an arrangement for naturalizing in England by statute all persons born in Scotland after the union; it being agreed that all persons born before the union were aliens, who could be naturalized only by the methods applicable to aliens. A great hearing of the question was had, which was given the form of a conference between the Lords and Commons of England, to which all the judges of England were summoned as advisers of the conference. The effect of the whole arrangement was to constitute the

judges of England an Extraordinary Tribunal to determine judicially the dispute between England and Scotland. At the hearing Sir Francis Bacon acted as leading counsel, and prominent lawyers of the House of Commons argued the case from the standpoint of the civil law, "the law of nations and of reason," the history of nations, and the common law. All the cases in the English year books and reports arising out of England's connection with the principalities and duchies in France and the Low Countries, with Ireland, and with Jersey and Guernsey, were examined. The case is reported in the State Trials under the title of the Case of the Postnati. In an opinion in which the principles of law and the precedents were fully discussed, the judges arrived at the unanimous conclusion that Scots born after the accession of James to the throne of England were entitled in England to full civil rights of person and property, but had no political rights; and that Scots born before the union were aliens in England. Though the judges in their opinions necessarily based themselves on English law and precedents, the investigation of counsel and the reasoning of the judges took so wide a range that the principles laid down were really those of universal law, and the effect of the decision was to recognize a supreme common law governing the relations between England and all the countries politically connected with her. The decision of the judges was accepted by the people of England and Scotland, and the dispute was thus judicially settled. A test case called Calvin's Case, involving the same questions as the Case of the Postnati, was brought two years later to the Court of King's Bench, and was heard before all the judges, the decision being the same. By reason of the nature of the points decided in the Case of the Postnati, and the manner of the decision, and by reason

of the fact that this decision did in fact settle the difficulty between England and Scotland, the Case of the Postnati had the dignity of an international adjudication and illustrated the possibility of Courts having jurisdiction over States.

Incidentally, the judges in their opinions in these cases, stated the principles which in the past had governed the relationship between England and the countries subordinately connected with her; thereby in fact establishing the principles upon which the relationship between England and the American Colonies was to rest. The King in Council was recognized as having a superintending legislative power and jurisdiction over all countries subordinately connected with England, to be exercised by orders in council or by writs. The Parliament was recognized as having a superintending legislative power over such countries above that exercised by the King in Council, this power being exercised by means of Acts of Parliament in which the colonies were specially named. A special Act relating to a country outside the realm of England—which was necessarily not represented in the Parliament—could be intelligently framed only after investigation of the facts and hearing of the parties concerned. In passing such special Acts, therefore, the Parliament, if it acted reasonably and conscientiously, necessarily acted both as a tribunal having jurisdiction over such countries and as a legislature.

When, therefore, the English colonization of America began, in 1606, not only were the minds of the people of England habituated to the idea of government through councils of experts sitting as tribunals as well as legislatures, but they had just had an object lesson in international adjudication. The English colonists of America had moreover special cause to be familiar

with the Case of the Postnati and Calvin's Case, for the principles laid down in them in fact formed the unwritten constitution governing the relations between England and the American Colonies. A permanent tribunal in England exercising jurisdiction in disputes between England and the Colonies, or between one colony and another, determining their rights against each other according to sound political, legal, social, and economic principles, was probably regarded by all as an appropriate means for maintaining proper relations between them. It was of course impossible at that time for the Colonies to be united with England by representation in Parliament, and such a tribunal was the only practicable bond of union between them. Such a tribunal was not inconsistent with a system of local self-government in the Colonies; indeed it depended for its success upon a recognition of their self-governing statehood, and of their power and duty to execute the judgments of the tribunal in so far as they appealed to the reason and conscience of the people of the Colonies as reasonably necessary and just.

By the Charter of 1606, James I claimed all North America between 34° and 45°,—that is, all the region between what is now South Carolina and what is now Canada,—calling it "Virginia"; and divided it into two districts overlapping between 38° and 41°, one of which was probably intended to be a northern and the other a southern viceroyalty,—the middle line falling very close to what was later on "Mason and Dixon's Line" between the Northern and Southern States. In each of the grand divisions provision was made for an English Colony with specified boundaries. The local government of each Colony was placed in charge of a local Council, called the "Council of the First (or Second) Colony," to be appointed by, and to act under the instructions of the King

in Council. The Charter also provided for a Council in England, to be "Council of Virginia." The ultimate and supreme power over the Colonies was recognized as vested in the whole State and Government of England, and this power was to be executed, so far as the Charter shows, by the King in Council. The "Council of Virginia" was given jurisdiction, subject to final decision of the King in Council, to determine disputes between the Colonies, and advise the King concerning the general social and economic situation; the Charter providing that this Council was to have the "superior managing and direction only of and for all matters that may concern the government, as well of the several Colonies, as of and for any other part or place within the aforesaid precincts of four and thirty and five and forty degrees."

The likeness between the system of government established by this Charter, and the Spanish system, is apparent. The Council of Virginia corresponded to the Council of the Indies and the Council of each Colony to the local *Audiencia* in each of the Spanish colonies which conducted the local government. The Charter made no provision for representative Assemblies in the Colonies—in this respect also conforming to the Spanish system. Some basis is to be found for a belief that this Charter shows Spanish influence in the fact that England and Spain were then in close relationship under Treaty of 1604, and that Spanish ideas were prevalent at the English Court. As, however, the Charter was drawn by the most eminent English lawyers, and as the English scheme of colonization of America was strongly opposed by Spain, it seems more reasonable to believe that the Council of Virginia was a development of the ideas underlying the English Privy Council than that it was based on any foreign model.

The Charter of 1606 proved ineffective, because it did not induce sufficient emigration. There was no precious metal to produce quick returns to the colonists. They could only hope for the slow return from agriculture and trade; and this necessitated the use of large amounts of capital and systematic operations for colonizing the country and protecting and supplying the colonists until they could become self-supporting. In 1609, the "First Colony" referred to in the Charter of 1606 was organized as a colonizing and trading joint-stock corporation called the Virginia Company, which was authorized to colonize and govern the region at present included within Virginia and the country to the westward. The Company was given the privilege of the general and local government of the country granted, and the monopoly of its trade. The governing board of the Company in England was constituted by the Charter the "Council of Virginia" and was subordinate to the King in Council. By an amendment in 1611, the adventurers were allowed to sit with the Councillors, and the meetings were called "Courts" of the Company. Four "Great and General Courts" in each year were required to be held "for the handling, ordering, and disposing of matters and affairs of greater weight and importance, and such as shall or may in any sort, concern the weal public and general good of the said Company and Plantation."

This Charter was unsatisfactory. By the people of England it was objected to as giving to the Company a monopoly; the King regarded it as too democratic and republican, and as likely to lead to too radical ideas in the Colonies; the nobility found fault with it because it allowed merchants to sit in one of the King's councils.

The admission of merchants to membership in this

council was, it would seem, due to the economic necessities of the situation. The opening of the sea-route to India and America, the closing of the Mediterranean to the Oriental trade by the Mohammedan invasion of what is now Turkey, the consequent ruin of Venice, and the decline of Spain and Portugal through extravagance and bad government, had made the English Channel the Mediterranean of the world, and London, as the most secure port on the Channel, was becoming the metropolis. England required a permanent economic connection with America, in order that raw material might be secured and an increased market for English manufacturers might be provided. The tribunal in England having jurisdiction over the relations of the American Colonies, in order to be efficient, had to be so organized as to be able to cope with economic as well as with social and political questions. The system was perfected half a century later, by the institution of a Council of Trade, subordinate to the King in Council, having charge of these economic relations.

Under the Charter of 1609, the local government of Virginia took on a democratic and republican aspect. To the Governor and Council appointed by the King in Council was added in 1621, by consent of the King in Council, a representative "House of Burgesses," all together constituting the General Assembly of Virginia. In the Ordinance of the Company establishing this system occurred the remarkable provision that no orders of the General Courts of the Company should bind the Colony unless ratified by the General Assembly of Virginia,—a provision which left to the General Courts of the Company what was essentially a power of adjudication, and gave Virginia the power of executing the judgments of the Courts of the Company according as these judgments were approved by the public sentiment

of the people of Virginia. This ordinance, representing as it did the maximum of self-government which was ever granted by England to any of the Colonies, was regarded by all the Colonies as a fundamental constitution determining the relationship not only between England and Virginia, but between England and all the Colonies.

In 1620, an experiment was made of another system, resembling somewhat that of the Virginia Company. A colonizing and trading corporation of forty members with power of self-perpetuation by the name of "Council for New England," was chartered by James I, with power of government and trade monopoly throughout North America from 40° to 48°,—that is, approximately from what was afterwards "Mason and Dixon's Line," to the mouth of the St. Lawrence. The meetings of the council were described in the Charter as "Courts." The Company, which was at the same time "Council" and a "Court," thus constituted a tribunal in England having jurisdiction, subject to the King in Council, of the colonies to be formed in this great region. As a corporation it was subject to have its charter forfeited for cause by *quo warranto* proceedings; and its monopoly made it vulnerable. The opposition of Parliament to monopolies was so great that the corporation did little more than make grants of land.

Charles I, upon coming to the throne in 1625, abolished the Virginia Company, and took Virginia under the direct government of himself advised by his Privy Council, without any subordinate council. In 1628 he granted a Charter to the Company of Massachusetts Bay, empowering it to colonize the region surrounding what is now the city of Boston, with full powers of government and without express reservation of control by the King in Council or by Parliament.

The meetings of the Company were described in the Charter as "Courts," and four "Great and General Courts" of the Company were to be held in each year. It was not specified whether the Company should be located in England or in Massachusetts Bay.

This Charter was based upon principles of government inconsistent with the Latin theory of government held by Charles I, and his Privy Council, according to which the binding force of governmental acts was derived from the King's command, and so evidently made the public judgment supreme within the Colony, that when the Company removed to Massachusetts Bay, it became specially obnoxious to the King in Council, and the charge was made that the Charter was obtained "surreptitiously."

In 1635, the Council for New England surrendered its Charter and the King created a special commission to regulate all the English Colonies in America and elsewhere, composed of the highest clerical and lay officials of the realm—William Laud, Archbishop of Canterbury, being the President. This commission was invested with full powers, and it seems to have been responsible only to the King in person. It was expressly given power to determine all disputes between the Colonies. The Letters Patent read, in this respect:

> Farther, be it known that we constitute you, or any five or more of you, our commissioners, to hear and determine, according to your sound discretions, all complaints whatsoever, whether against the Colonies themselves, or their Presidents or Governors, either at the instance of the party aggrieved, or upon information concerning injuries done, . . . and to summon the parties before you, and they having been heard, . . . by themselves or by their attorneys, to extend to them full and complete justice.

This tribunal was also authorized to hear and determine controversies between the Colonies and England, their powers extending to the revocation of "charters surreptitiously or unduly obtained or prerogatives granted on terms prejudicial to the rights of the Crown or of foreign princes"; the commission being required to proceed in such cases "according to the law and custom of our realm of England." It was this tribunal which directed that a *quo warranto* suit be brought against the Massachusetts Bay Colony to forfeit its Charter on the ground that the Charter was obtained surreptitiously and unduly and that it was not intended to authorize the whole government of the Colony to be removed to America.

The arbitrary methods of Archbishop Laud led the Colonies to distrust the commission as formed, but they recognized the necessity of a reasonable judicial control by the King in Council. In 1638, the General Court of Massachusetts Bay, in its answer to the demand of the commission to surrender up the Charter for cancellation, declared that Massachusetts Bay was "ready to yield all due obedience to our Sovereign Lord the King's Majesty, and to your Lordships under him." The expression "due obedience" or "due subjection" was often used in the Colonial documents as describing the relation of the Colonies to England, to signify that they regarded themselves as subject only to the power of England duly exercised,—that is, exercised to the extent needful for the common good. They regarded themselves as free states or commonwealths, and based their subjection to the reasonable jurisdiction of England partly on their consent, partly on the economic necessities of the case, and partly on the moral compulsion growing out of their special relationship toEngland and their general relationship with the rest of the world.

The position taken by the General Court of the Massachusetts Bay Colony was in harmony with the prevailing sentiment in England. In 1640, the Parliament by an act declared and "regulated" the powers of the King in Council and defined its jurisdiction as a tribunal. This act provided:

> That neither his Majesty, nor his Privy Council, have or ought to have any jurisdiction, power or authority, by English bill, petition, articles, libel, or other arbitrary way, to examine or draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any of the subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice and by the ordinary course of law.

The effect of this statute was to differentiate the King in Council from the ordinary courts of justice of the realm of England and to make the King in Council an Extraordinary Court for the judicial settlement of disputes arising outside of the realm of England but within the English empire. In the exercise of this extraordinary jurisdiction it acted according to the equity of the laws of England, inasmuch as all the Colonial charters provided that the Colonial law should be not inconsistent with the law of England.

In 1638, the people of the town of Windsor, Hartford, and Wethersfield, in what is now Connecticut, without any charter from England, "associated and conjoined" themselves "as one public state or commonwealth." In their articles of "combination and confederation," they provided for two "General Assemblies or Courts" to be held annually and to be composed of deputies of the towns. The whole State was spoken of in the articles as a "Jurisdiction." A Governor and six Assistants were to be elected and were to have power "to

administer justice according to the laws here established, and for want thereof according to the rule of the word of God." It was provided that the General Court should be "for the making of laws and any other public occasion which concerns the good of the Commonwealth,"—a power sufficiently broad to enable the General Court to adjust disputes between the constituent towns and to make treaties with their neighbor "Commonwealths" or "Jurisdictions."

In the Massachusetts Bay "Body of Statutes" of 1641, the "Commonwealth" of Massachusetts Bay was spoken of as a "Jurisdiction."

In 1643, when England was distracted by the civil war, the Colonies of Massachusetts Bay, New Plymouth, Connecticut, and New Haven found themselves in a position where they were obliged to defend themselves from external attack and where they were at the same time in danger of war among themselves unless they could find a peaceful way of settling their disputes. They accordingly entered into a Confederation, by the name of "The United Colonies of New England." One of the Articles of Confederation provided:

> If any of the Confederates shall hereafter break any of these present articles, or be any other way injurious to any of the other Jurisdictions, such breach of agreement, or injury, shall be duly considered and ordered by the Commissioners for the other Jurisdictions, that both peace and this present Confederation may be entirely preserved without violation.

Before tribunals organized according to this provision, several disputes between the Colonies regarding boundaries were heard and determined. The case of the greatest consequence which came before these tribunals, however, was that between Massachusetts and

Connecticut involving the right of Connecticut to impose duties on the navigation of the Connecticut River, in consideration of the maintenance by Connecticut of a fort at the mouth of the river. The case was decided in favor of Connecticut and was twice afterwards argued on rehearings asked by Massachusetts. Retaliation by Massachusetts finally resulted in a free trade system among the Confederates.

On November 3, 1643, three months after the New England Confederation was formed, the Lords and Commons, who then constituted the legislature of England under a provisional government practically republican in form, passed an ordinance establishing a new commission with full jurisdiction over all the English colonies. The Earl of Warwick was named as president of the commission, and Sir Henry Vane, John Pym, and Oliver Cromwell were among the members. One of its first acts was to grant a charter to Providence Plantations, which had been excluded from the Confederation on account of the strong individualistic doctrine of the settlers there. In this charter the commission asserted its jurisdiction to determine disputes between the Colonies by a clause which read:

> Always reserving to the said Earl and Commissioners, and their successors, power and authority to dispose the general government of that, as it stands in relation to the rest of the Plantations in America, as they shall conceive, from time to time, most conducive to the general good of the Plantations, the honor of his Majesty, and the service of the State.

This commission, and its successor, the Committee of the Council of State for the Plantations, established when the English Commonwealth was instituted in 1649, permitted the United Colonies of New England

to operate under their Articles of Confederation in subordination to the supreme power of the Commonwealth; and the Confederation continued in full vigor until the restoration of Charles II in 1660.

Under Cromwell, provision was made for determining the economic as well as the political relations of the colonies by the institution of a Council of Trade, which was subordinate to the Committee of the Council of State for the Plantations. The Council of Trade acted as a tribunal of first instance or a master in chancery, deciding routine matters and reserving the more important questions for the decision of the Committee of the Council of State for the Plantations and later of the Lord Protector in Council. From the beginning the Colonies had had the practice of sending commissioners to England or employing agents there to represent their interests in special emergencies before the King in Council. Massachusetts Bay, in 1637, had sent agents to represent it before the Laud Commission. This now began to become a settled custom, but it was fifty years after this time before the system came into full operation.

The passage of the Navigation Act in 1651, by the Parliament of the Commonwealth, brought up in acute form the question how the relations between England and the Colonies, and between the Colonies individually, ought to be determined. The object of this Act was to restrict the trade of the Colonies to the English market, and to place the whole carrying trade in the hands of English shipowners, thus giving England the monopoly of the trade of the Colonies. This action was acquiesced in by some of the Colonies, as a reasonable regulation of their foreign and intercolonial trade necessitated by the circumstances. Others regarded it as evidencing the adoption by England of a theory of

absolute power over the Colonies. It appeared to them to show that England had accepted the "Colonial Pact" theory invented by Richelieu a few years before, by which the claim of France to absolute power over her colonies had been concealed under the pretext that there existed a Fundamental Compact between France and her colonies by the terms of which the colonies were assumed to have granted to France a monopoly of their trade in consideration of her assumed promise to protect them. On this theory, there was no occasion for a tribunal in England having jurisdiction over the Colonies. They had no rights against England, and were bound implicitly to obey the edicts of England. All the Colonies moreover objected to Acts of Parliament which purported to affect them, because it was evident that Parliament was not organized as a tribunal but as a representative of territorial districts in England. Upon the passage of the Navigation Act in 1651, Virginia revolted from the Commonwealth, claiming that the Act was a violation of the principle that the subjection of the American Colonies was to a proper tribunal in England, and that the Colonies were subject to no legislatures except their own. Commissioners were sent by the Commonwealth Parliament to Virginia, who, under instructions, succeeded in settling the controversy by agreeing to Articles of Capitulation in which it was declared that Virginia (and, by necessary implication, all the other Colonies) owed only "due obedience and subjection to the Commonwealth of England," and that the "submission and subscription" of Virginia was a "voluntary act" on her part.

This great constitutional settlement between the Commonwealth of England and the American Colonies made the validity of the Navigation Act and of all other governmental acts of England relating to the

Colonies depend upon whether or not they were reasonable and just under the circumstances, the Colonies having the right, at least in extreme cases, to determine the question of reasonableness and justness as well as England. In case of deadlock, there was no solution except through agreement in conference, or through arbitration, or through judicial decision by the King in Council, or through war. The relations between England and the Colonies and between the Colonies individually, under this settlement, bore a close resemblance to those of states which are subject to the principles of international law.

With the restoration of Charles II in 1660 and the cessation of the domestic troubles of England, a systematic reorganization of the American Colonies was begun. As the sytem was developed during the century succeeding his accession, three general objects were pursued—the establishing of direct and close communication between each colony and England; the directing of the trade of each towards England as the common market; and the maintaining of a permanent political connection between all parts of the empire. In pursuance of the first object the Dutch and Swedes were dislodged from the regions about the Hudson and Delaware Rivers, and the whole sea coast from what is now the southern boundary of Georgia to what is now the northeastern boundary of Maine was divided so that ultimately there were formed twelve Colonies, each having a good harbor from which ships could sail direct to England. In pursuance of the second object, the Navigation Act was continued and more stringent provisions were made for carrying it into effect, it being the general understanding, at least in the Colonies, that this Act was an exceptional measure necessitated by the circumstances and dependent for its validity

upon its reasonableness and necessity and upon their consent or acquiescence. In pursuance of the third object, the general jurisdiction of the relations of the Colonies was placed in charge of the King advised by a standing committee of the Privy Council known as the Committee of the Privy Council for Plantation Affairs, which was itself assisted by a subordinate judicial and administrative body of experts known as the Board of Commissioners for Trade and Plantations. This subordinate tribunal was appointed by the King in Council and was specially concerned with economic questions, though it appears to have had a general jurisdiction. Important matters, particularly those involving diplomatic and political action with reference to the Colonies, were referred by this subordinate council to the Committee of the Privy Council for Plantation Affairs.

During the last years of the reign of Charles II and during the reign of James II this system of managing the relations with the Colonies was rendered unpopular in America by the arbitrary methods pursued, and particularly by the attempts of these monarchs to centralize the system by the abolition of the corporate and proprietary charters of the Colonies and by the substitution for them of charters converting each Colony into a royal province, ruled by a Governor and Council appointed by the King. It seems probable that it was intended by them to form the Colonies into two viceroyalties—a northern and a southern—composed of provinces; the dividing line being that of 40°. When this plan was abandoned, various schemes for uniting the Colonies under a Governor General and a General Council appointed by the King in Council were agitated. William Penn, who in 1693 had published a plan for uniting Europe under a general government, proposed in 1697 to the English Government

a plan for uniting the American Continental Colonies under a general government, subject to the supremacy of England. All plans for a union, however, failed, and until shortly before the American Revolution, the King in Council was the bond of union between England and the Colonies and between each Colony and all the others.

In 1700, the Commissioners for Trade and Plantations recommended that the practice of having agents in London be adopted by all the Colonies, and most of them thereafter adopted the practice. The Colony agents occupied a relationship to Parliament somewhat similar to that of a delegate without power to speak or vote, or even to sit in the body, yet recognized by committees and in some cases called to the bar of the House of Commons to present the views of the Colonies. As respects the King in Council, their relationship was semi-diplomatic. As respects the Commissioners for Trade and Plantations, their position was essentially that of attorneys in England for the Colonies. Thus the whole governmental establishment of Great Britain stood in the relation of a supreme tribunal for the Colonies rather than a supreme legislature. Even Acts of Parliament were regarded as deriving their binding force from the acquiescence of the Colonies in them as necessary and just regulations for the common defense and general welfare.

The merger of England and Scotland in 1707, by which was formed the United Kingdom of Great Britain, brought various new ideas and influences to bear upon the relations between the Colonies and the mother country; but under the British empire the system whereby the King in Council acted as the bond of union was not essentially changed. During the decade between 1730 and 1740, the system probably obtained its highest degree of perfection and its greatest success.

From about the year 1700 until shortly before the Revolution, the King in Council was both the supreme political tribunal of the empire and the supreme court of appeals of the empire. Besides the political committee already mentioned—the Committee of the Privy Council for Plantation Affairs,—there existed a judicial committee known as the Committee for Appeals. This latter committee had jurisdiction of appeals from the supreme courts of the Colonies. As appears from the statement of Lord Mansfield in the great case of Campbell *v.* Hall, decided in the King's Bench in 1774, it was the law that the King in Council could do nothing as respects the Colonies which was "contrary to fundamental principles"; from which it appears that it was the duty of the King in Council, in exercising jurisdiction over the Colonies, to recognize and regard, both in its political and its judicial action, the fundamental rights of the individual to life, liberty, and property. Disputes between the Colonies, or in which a Colony or Great Britain was involved, were within the jurisdiction of the King advised by the Committee of the Privy Council for Plantation Affairs, who arranged the method of trial in each case.

Several cases involving the boundaries between Colonies were settled between 1700 and 1770 by the political committee of the King in Council. One of these was that which arose in 1736 between Maryland and Pennsylvania in regard to a part of the region which is now Delaware. After much trouble between the border populations and many ineffectual attempts of the local governments to adjust the matter, the dispute came to the King in Council in 1750. As it appeared that the controversy arose out of an agreement between the Lords Proprietors, who were within the jurisdiction of the English courts by reason of their residence in Eng-

land, the King in Council acquiesced in a plan whereby a suit in chancery for specific performance of the agreement and for the settlement of boundaries and the quieting of title was to be brought by the Proprietor of Pennsylvania against the Proprietor of Maryland in the English court of chancery, the right to jurisdiction over the region in question to be settled by order in council according to the decision. The suit, by the title of Penn *v.* Lord Baltimore, was accordingly brought, and was heard and adjudicated by Lord Chancellor Hardwicke. Upon report of the decision of the court of chancery to the King in Council, an order in council was made in conformity with the decision, establishing the right of Pennsylvania to jurisdiction over the region in dispute.

In granting a motion of the defendant to make the Attorney General a party, Lord Hardwicke said (Ridgeway, 332):

> This is a question between feudatory Lords, Proprietors of Provinces, and concerning not only their private interest, but the rights of government and the rights of private persons. . . . The disputes of private persons in the Provinces are determined in the courts of the Province, on which a writ of error by way of appeal lies before the King in Council. Therefore questions between Proprietary Lords, in analogy to the ancient law of the Marches, must be determined before the King in Council. . . .
>
> If . . . Proprietary Lords are to alter the bounds of their Provinces without the privity and consent of the Crown, by whom alone such powers are vested, directed and disposed, consider the inconveniences that must follow; this is no less than transferring lands into different jurisdictions, legislations, etc., you subject the people to different government, different assemblies, laws, courts, taxes, etc., to which they never assented by their delegates.

Delivering the opinion on final hearing (1 Vesey Sr., 444), Lord Hardwicke said:

> This cause [is] for the determination of the right and boundaries of two great Provincial Governments and three Counties; of a nature worthy the judicature of a Roman Senate rather than of a single Judge; and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a Roman Senate that will correct it.
>
> . . .
>
> It is certain that the original jurisdiction in cases of this kind relating to boundaries between provinces, the dominion and proprietary government, is in the King and Council; and it is rightly compared to the cases of the ancient Commotes and Lordships Marches in Wales; in which if a dispute is between private parties it must be tried in the Commotes or Lordships, but in those disputes where neither had jurisdiction over the other, it must be tried by the King and Council; and the King is to judge, though he might be a party; this question often arising between the Crown and one Lord Proprietor of a Province in America; so in the case of the Marches it must be determined in the King's court, who is never considered as partial in these cases; it being the judgment of his judges in [the King's Bench] and chancery. So where before the King in Council the King is to judge, and is no more to be presumed partial in one case than in another.

Another case of disputed boundaries which came before the King in Council for settlement was that of New Hampshire against Massachusetts. There being in this case no Lords Proprietors, of whose persons the English courts might have jurisdiction, and no agreement,—the case arising under the Charters of the Colonies,—the King in Council ordered a reference of the case to a commission in America composed of twenty persons, who were to be the five eldest councillors of

the Colonies of New York, New Jersey, Nova Scotia, and Rhode Island, any five being a quorum, and their decision being reviewable by the King in Council. The Massachusetts Assembly wished the reference to be to "wise disinterested persons" to be chosen equally by or in behalf of the parties, those in behalf of Massachusetts "to be chosen by the Assembly of that Province out of the neighboring governments"; but this request was denied and the commissioners were named by order in council.

About the year 1755, the system began to break down. In part this was no doubt due to the recrudescence of autocratic and absolutist ideas throughout the European world. In part it was probably also due to the necessities of international trade. The close and continuous contact of British traders and government officials with the peoples of the Orient and the tropics who understood no governmental power which was not absolute, had led the British government to claim and assert absolute power over these peoples, and it doubtless appeared to British statesmen that to recognize the American Colonies as subject only to a jurisdiction on the part of Great Britain was inconsistent with the exercise of the absolute power which it seemed necessary to assert in dealing with Oriental and tropical peoples. However this may be, Great Britain about the year 1755 began to advance the claim that it had absolute power throughout the empire, with the right to monopolize the trade of all the subordinate parts and to tax them for the general defense and welfare; the excuse for the claim of absolute power being the assumed duty of Great Britain to protect all parts of the empire. This system, called in France, as has been said, the system of *le Pacte Colonial*, was in England called "the Mercantile System."

The war between Great Britain and France for the ten years from 1753 to 1763, which was largely fought on American soil and in which British and American soldiers served side by side, delayed and concealed the carrying out of the new policy. The British and Americans fraternized and good feeling reigned. The acquisition of Canada by Great Britain as the result of the war, however, brought matters to a head. British America, instead of consisting of a row of seaboard colonies inhabited by British settlers, with direct communication from each by sea to Great Britain, became a great region into which, through the St. Lawrence and the Mississippi, French and Spanish influences had penetrated, and containing a great body of uncivilized aboriginal inhabitants. At one stroke, the old system of government was made impossible, and a new situation created which, as it seemed to British statesmen at least, could be met only by the exercise of absolute power.

Immediately a system of absolutism was put in force. By edict of the King in Council in 1763, the western bounds of the old Colonies were limited to the Allegheny Mountains, and the whole of Canada (which included the Northwest Territory) placed under the government of the Crown. In 1764, the Colonies were taxed by Act of Parliament for the general purposes of the empire, both internally by a Stamp Act and externally by tariff duties on goods imported into the Colonies. When the Stamp Act was repealed, Great Britain by a Declaratory Act of Parliament asserted its absolute power in the empire. By this Act, it was declared that the Parliament of Great Britain "had, hath, and of right ought to have full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America,

subjects of the Crown of Great Britain, in all cases whatsoever."

The Americans stood for the old system. They were willing to recognize Great Britain as having jurisdiction over the Colonies as free states, reserving their right of judgment, at least in extreme cases, for the protection of their honor and dignity-and for their self-preservation. They acknowledged the supremacy of Great Britain in reasonably and justly regulating the common affairs of the states of the empire, particularly in regulating the intercolonial commerce and the foreign commerce of the empire and of all its constituent states. They considered that this jurisdiction ought to be exercised by a properly constituted tribunal in Great Britain of which the King should be the head, and they were even willing to conform to acts of Parliament passed in the reasonable exercise of this jurisdiction; but they would not accept even a theoretical claim of absolute power over them, however benevolent might be the despotism.

The issue raised by the Stamp Act, the Declaratory Act, and the Tea Act, was whether Great Britain had legally unlimited power over the colonies as their supreme absolute legislature or whether it had a legally limited power—that is, a jurisdiction over them—as their supreme tribunal and supreme executive legislature. The Americans at first tried to find a legal limitation of the powers of Great Britain in the Colonial Charters and in the British Constitution, but failed to make out a complete case. The charters were acts of the British Crown and recognized the power of Parliament without mentioning conditions or limitations, and the only doctrine of the British Constitution which could be applied was that which asserted the injustice of taxation without representation—a doctrine which

had in fact no application, because the Americans refused to be represented in a Parliament three thousand miles away and the British refused to allow such a representation.

Burke declared that the British empire of that day could not be constituted on the basis that Great Britain was essentially the supreme tribunal of the empire. No peace in the British empire was possible, he asserted, in his Speech on Conciliation, which was to "depend upon the juridical determination of perplexing questions, or the precise marking of the shadowy boundaries of a complex government." Great Britain, or Great Britain and the American Colonies integrated in a common representative Parliament, he asserted in his Speech on American Taxation, must of necessity exercise absolute power in the empire.

"The Parliament of Great Britain," he said, "sits at the head of her extensive empire in two capacities: One as the local legislature of this island, providing for all things at home immediately and by no other instrument than the executive power. The other, and I think her nobler capacity, is what I call her imperial character, in which, as from the throne of Heaven, she superintends all the several inferior legislatures, and guides and controls them all without annihilating any. . . . It is necessary to coerce the negligent, to restrain the violent, and to aid the weak and deficient, by the overruling plenitude of her power. She is never to intrude into the place of others, whilst they are equal to the common duties of their institution. But in order to enable Parliament to answer all these duties of provident, and beneficent superintendence, her powers must be boundless. Such, sir, is my idea of the Constitution of the British empire as distinguished from the Constitution of Britain.

Burke's Speech on American Taxation closed the issue between Great Britain and America. From that

moment the Continental Congress realized that they were called upon to decide a single momentous question—for Burke's plan of integrating Great Britain and the Colonies in a common representative Parliament was recognized as wholly impracticable—which was, whether the American Colonies should remain a part of the British empire on the understanding that Great Britain's power in the empire should thereafter be a power to command instead of a power to lead the Colonies in judgment, or whether they should declare themselves independent states and organize a political union independent of Great Britain and the British empire, in which their political ideas should be applied. If they took the latter course, it was necessary to state reasons which would appeal to the civilized world why Great Britain should not exercise absolute power in the empire, for the doctrine of Great Britain was the accepted doctrine of Europe. It was useless for such a purpose to talk of rights under the Colonial charters or under the British Constitution. It was necessary for them to base themselves on universal and fundamental principles and to commit the American States forever to the principles announced.

The Continental Congress was equal to the emergency. By the Declaration of Independence, the American Colonies, as free, independent, and united states, denied the claim of Great Britain to exercise absolute power in the British empire by asserting as a universal doctrine that supreme power in civilized society is limited by "the laws of nature and of nature's God," and that the function of all governments is to exercise jurisdiction under this law for the purpose of "securing" to each individual those "unalienable rights" with which all men are endowed by their Creator for their self-protection and self-preservation—called in the Dec-

laration the rights of "life, liberty, and the pursuit of happiness"—and to which all are equally entitled by reason of the creation of all men by the common Creator. The binding force of all acts of government was held to arise from the exercise of this jurisdiction by the government and from the acquiescence of the governed, as beings endowed with reason and conscience, in the necessary and just judgments of the government, made for the purpose of securing the fundamental rights of the individual.

The Declaration of Independence was also a Declaration of Union. By laying down these principles of government, it had the negative effect of eliminating Great Britain as the supreme government of the Colonies; by asserting the union of the American States to support these principles, it had the affirmative effect to commit the individual States and the United States to the principles of government which it declared.

Accepting the principle that the supreme power of government is the power to judge, it follows from the fact that each state must necessarily have relations with its own citizens and with persons and states external to itself, that if a state assumes to finally determine these relations, it acts as a judge in its own cause. By the Declaration of Independence, the American Union acted as a judge in its own cause in declaring the political connection between Great Britain and the Colonies to have been dissolved by the acts of Great Britain. The Americans based their judgment on the ground that the action of Great Britain was in violation of the fundamental rights of the individual. Recognizing, however, the danger to the peace of the world from states acting as judges in their own causes, they declared, in the Declaration, that whenever states so act, "a decent respect to the opinions of mankind requires

that they should declare the causes which impel them."

Before the Revolution, the American Colonies, though they regarded themselves as free states or commonwealths, were willing to have the disputes between themselves and with the mother country settled by the King in Council, though that was a tribunal of the mother country and was open to the objection that it was a judge in its own case. Because that tribunal was composed of men trained in political, social, and economic judgment and was headed by the King, who was by his office bound to be impartial, they accepted and executed its adjudications.

Burke, in his Speech on Conciliation, said:

> We are, indeed, in all disputes with the Colonies, by the necessity of things, the judge. But I confess that the character of judge in my own cause is a thing that frightens me. Instead of filling me with pride, I am exceedingly humbled by it. I cannot proceed with a stern, assured, judicial confidence, until I find myself in something more like a judicial character. I must have these hesitations as long as I am compelled to recollect that, in my little reading upon such contests as these, the sense of mankind has at least as often decided against the superior as the subordinate power.

The humility which Burke regarded as necessary in one who is called upon to be a judge in his own cause would seem to be as likely to create a bias in him favorable to his adversary as pride would create in favor of himself. The only reasonable means by which bias can be avoided by individuals, peoples or states, whether the judgment be required to be given in one's own cause or in the cause of others, would seem to be training and education in judgment, and an appreciation of the truth which Burke stated, that every judg-

ment will ultimately be reviewed by "the sense of mankind," which will "as often decide against the superior as the subordinate power."

Upon the promulgation of the Declaration of Independence the Congress regarded itself as the successor of the King in Council. Until the Articles of Confederation were adopted, it exercised the powers which had been exercised by the King in Council over the Colonies previous to the Declaration. By the Articles of Confederation, these powers were reduced to writing and given the sanction of a mutual agreement of the States. As the King in Council had been recognized as "the last resort, on appeal," in disputes between the Colonies, the Articles of Confederation made the Congress a tribunal of the same kind, for the same purpose, and authorized it to act, as the King in Council had done, by means of a tribunal instituted in each case under its auspices.

In the Constitution, the people of the United States and the States of the Union divided between the Congress, the President, and the Supreme Court the powers granted by the Articles of Confederation to the Congress of the Confederation, and, in addition, granted to the Congress the power to legislate in execution of the powers granted to it. They also granted to Congress the power to regulate by legislation the interstate and foreign commerce of the United States. To the Supreme Court naturally fell the function of determining disputes between the States of the Union, and the remarkable provision was added that foreign States might avail themselves of the jurisdiction of the Supreme Court if they had disputes with States of the Union. This provision was perhaps suggested by the fact that the American Colonies, though holding themselves to be free states in some respects foreign to Great

Britain, had appeared before the King in Council as plaintiffs and defendants and had found it an impartial tribunal, though it was a national tribunal of Great Britain. The Constitution preserved the dignity of the United States and of the States by recognizing their rights to act as judges in their own causes, if they saw proper, as respects claims of individuals against them. Inasmuch as the Supreme Court was granted only the "judicial power" of the United States, its jurisdiction was, it would seem, limited to the decision of cases which are of such a nature as to be capable of judicial settlement. Opportunity was provided for settling disputes between States by conference or arbitration by the provision of the Constitution which recognized the right of the States to enter into treaties or contracts with each other by consent of the Congress; and if there be disputes between States of the Union which are not capable of judicial settlement, the States involved may, it would seem, establish in each case of dispute, by consent of Congress, a political tribunal for the settlement of the dispute.

It will have been noticed, in the course of this investigation of the process of the development of the American doctrine of jurisdiction of courts over States that the fundamental political belief of the people of the American colonies and of the United States has always been that there exists a supreme universal law governing the actions of States, which secures to each individual his right of self-protection and self-preservation, and that the actions of states, nations, and empires, are void so far as they are inconsistent with the "securing" of these "unalienable rights." It may well be questioned whether it is not through this conception of a universal supreme law that there exists among the American people the conception of a constitutional law

which is supreme over States, and which is formed by agreement of the people and States concerned to live in indissoluble union. If this constitutional law has its sole basis in agreement, there may be a question as to its supremacy and as to the indissolubility of the Union. An agreement which is supreme over those who agree to it, and which is indissoluble, is a self-contradiction. Indissolubility of an agreement, and its supremacy over those who agree to it, must depend upon some other fact than the agreement of the parties.

The theory that the supremacy of the Constitution of the United States arises from the agreement of the people and States of the United States was invoked in the Civil War as a reason for dividing the Union into two unions when the people of the two sections differed in their opinions concerning the nature of the Constitution which they desired. The Union was upheld by those who believed in the existence of this supreme universal law referred to in the Declaration of Independence which secures "the unalienable rights" of all men to "life, liberty, and the pursuit of happiness." After the war, the Union was by the fourteenth amendment again expressly committed to the maintenance of this law; which thus became the real bond of union between the people and States of the Union. By that amendment and the fifth amendment, the Supreme Court, in all cases brought before it, whether by or against States or persons, was authorized to hold invalid any act of any legislative body, of any executive or administrative official, or of any court,—whether of a State or of the United States,—which deprives any person of his life, liberty, or property without due process of law. Under this authority the Supreme Court exercises a jurisdiction over States and over the United States similar to that which the ordinary courts

of justice exercise over private individuals. It is a logical and reasonable ground for maintaining and preserving the Union that the Union is the ultimate protector and preserver of this law, and that in order to perform this function it must have a supremacy over the actions of constituent States to the extent necessary to enable it to perform the function.

The question therefore arises, whether a true international court can ever exist until the nations of the world recognize this supreme universal law. Until such recognition is made, the powers of any body of men called an international court can, it would seem, never rise higher than a mere interpretation of treaties; for conventions are but joint treaties and supremacy of treaties or conventions over national law by agreement can of necessity exist only so long as the agreement exists, unless the agreement is itself the recognition of a supreme universal law. A court to interpret treaties would be useful, but it would be an instrumentality and adjunct of the states creating it, and would be bound by their agreements, even though such agreements might palpably deprive individuals of life, liberty, or property without due process of law.

If it be the fact, as American beliefs and experience would seem to indicate, that the test of the international character of a court is not whether it is established by the nations, but whether it administers a law which is supreme over the nations, there is, it would seem, no objection to national courts having jurisdiction to settle disputes in which foreign states or semi-foreign states (now called colonies or dependencies) are involved with citizens or states of the nation. Once it is recognized that a national court may administer a law which is supreme over states, there is no reason why, if the court is learned and impartial, it should not be resorted

to by foreign states for the judicial settlement of their disputes. So also federal states or empires may form their own courts for the administration of this supreme law as between their own constituent states, and may provide for the resort of foreign states to these tribunals.

By the establishment of such national, federal or imperial courts having jurisdiction over states by administering this supreme universal law, the supreme international court—when one shall be established by agreement of the nations—will be safeguarded, as the Supreme Court of the United States is safeguarded by the fact that every court in the United States administers this universal supreme law. Under such an arrangement the Supreme Court becomes "the last resort, on appeal," in disputes between states, and has the benefit of the consideration and action of other courts.

Such an international supreme court would of course need to be safeguarded in every possible way, so that its attention might be invoked only when the sifting process has been carried to the last extremity and when the final issues have been determined and the material facts on both sides have been stated in the most succinct form. During the Colonial period, England and Great Britain found it necessary to have the King in Council assisted by a subordinate council to act as master in chancery or referee, and to investigate social and economic questions. It was also found necessary that the King in Council should have power to appoint commissioners for investigating facts at a distance from Great Britain and should have, indeed, all the powers necessary to make its jurisdiction effective. Such powers, it would seem, an international supreme court ought to have.

In view of the fact that states may represent the

claims of their citizens against foreign states, the volume of business of a supreme international court will tend to be increasingly large, and it will become increasingly necessary as it has in the case of the Supreme Court of the United States, that the jurisdiction of such a court should, so far as possible, be limited to deciding questions which it has been impossible to decide by agreement or by resort to any other tribunal.

If it be the case, as it appears to be, that one of the functions of such an international supreme court would be to administer this supreme universal law, it would follow that it ought to have jurisdiction, similar to that which the Supreme Court of the United States has under the fourteenth amendment, in cases where a citizen of the state complains against his own state for its violation of his fundamental rights as an individual. Jurisdiction of such cases, would, it would seem, be as useful for doing away with the necessity of civil war as would the jurisdiction of cases between states for doing away with the necessity of foreign war.

This examination of the development of the American doctrine of jurisdiction of courts over states will, it is hoped, have served to show that the Supreme Court of the United States exists not merely as a part of the Federal Union for the interpretation of the Constitution, but that it has a reason for its existence which appeals equally to all the nations of the world, in that it expounds and applies the supreme universal law securing the fundamental rights of the individual, which the Constitution recognizes and which binds all nations and peoples; and in that it upholds the fundamental rights of the states is the best means of upholding this law.

It would seem, therefore, that it is immaterial whether the nations of the world shall federate in the

same way that the United States have federated or in any other way; or whether they shall remain substantially as they are at present. The close relationship of federal union under a general government may be too intimate for the separated and diverse nations of the world, and the most efficient bond of union may be this supreme universal law securing the fundamental rights of the individual against all governmental action, administered by the courts of all the nations, federal states, and empires of the world, and in the last resort on appeal by an international supreme court established by the nations.

EXECUTION OF JUDGMENTS AGAINST STATES

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JUDGMENTS AGAINST STATES

IN the Dred Scott case the parties were a black man and a white man; the former claiming emancipation from slavery because the latter, as his owner, had taken him from a slave-state to a free-soil state. The case came to the Supreme Court by virtue of its appellate jurisdiction. The judgment of the Supreme Court in favor of the white man as owner of the black man, was in fact a judgment against all the free-soil states, constituting about one half the states of the Union; and it was and is so universally regarded. The attempt to compel the execution of the judgment as a precedent led to the Civil War. The execution of the judgment as a precedent was forever brought to an end by the adoption of the thirteenth, fourteenth and fifteenth amendments to the Constitution.

In the case of Virginia *vs.* West Virginia the parties were two States of the Union. It was brought in the Supreme Court of the United States as a court of original jurisdiction. The issue involved was whether West Virginia should pay Virginia a less or greater amount of money under a contract between them. A greater amount was adjudged to be due than West Virginia expected, and more than it thinks reasonable. A ques-

tion of the compulsory execution of the judgment has thus arisen.

In the Dred Scott case the constitutional rights of the States of the Union were at issue, as well as the fundamental rights of all men to life, liberty, and the pursuit of happiness, of which every state, equally with the Union, is the constitutional guardian. It dealt with tremendous questions, vital to all men and to all sociated groups of men everywhere and in all time.

In the Virginia-West Virginia case, nothing but money is involved. The issues are in no sense fundamental or vital. No constitutional right of any state is affected.

Clearly, the judgment in the Dred Scott case, though rendered in a suit between individuals was, in essence, a judgment against the free-soil states, equally as the judgment in the Virginia-West Virginia case, rendered in a suit between these states, was a judgment against the State of West Virginia. Moreover, considering the vast issues involved in the former case and the insignificant issues involved in the latter, it is reasonable to conclude that issues vital to states may be involved equally in the one class of cases as in the other.

The question of the compulsory execution of the judgments of a court of a federal or federalistic union against a member-state of the Union, therefore, includes a consideration of the compulsory execution both of the indirect judgments rendered against states in suits between individuals and corporations, which we commonly speak of as judgments affecting states' rights; and of the direct judgments rendered in suits to which a state is a party defendant of record.

Moreover, it is important, in such an inquiry, never to minimize the importance of these indirect judgments against states; for a consideration of the principles of federal and federalistic unions will show that the indi-

rect jurisdiction of Courts over the member-states is a necessary, permanent, and ineradicable incident of all such unions; and that the direct jurisdiction of Courts over states is not a necessary incident of such unions, but is an expedient which has been adopted only by such federal and federalistic unions as have deemed it suitable to their circumstances, and which has not yet been proved to be capable of universal application.

As illustrating the truth of the proposition that indirect judgments of courts against states are a necessary incident of all kinds of federal or federalistic unions, one may recall, in addition to the Dred Scott case, Calvin's Case, decided in 1607 by an English court, in which the relations of England and Scotland under the union of the two states in the person of King James, as James I of England and James VI of Scotland, were adjudicated in a suit between individuals in their private capacity; the case of Campbell *vs.* Hall, decided in 1774 by an English court, in which the relations between Great Britain and the American Colonies as members of the federalistic union known as the British Empire, were adjudicated in a suit between individuals —the defendant being sued in an official capacity; and the Insular cases, decided between 1901 and 1912, by American courts and on appeal by the Supreme Court of the United States, in which the relations between the United States and the insular countries under its jurisdiction, together forming a federalistic union to which no name has yet been attached, were adjudicated in suits between individuals and corporations, suing or sued in private or official capacities.

As illustrating the truth of the proposition that it is not necessary that courts in federal or federalistic unions should have direct jurisdiction over the member-states, and that such arrangements are dictated in each

case by expediency and effectuated by agreement between the states, one may refer to the various federal constitutions, written and unwritten, which have existed and which now exist. Such an examination would reveal few instances in which a direct jurisdiction over states has been conferred on courts. The Constitution of the United States and that of Australia would, indeed, be the most conspicuous examples of federal constitutions in which this jurisdiction is conferred on courts; but under these constitutions, equally with all other federal or federalistic constitutions, the courts also render indirect judgments against the member-states. The absence of such a provision in the written or unwritten constitution of a federal or federalistic union does not mean that the courts have not jurisdiction over the member-states, but only that they exercise it indirectly.

By the Constitution of the United States, the jurisdiction to render a direct judgment against a member-state of the Union is confined to the Supreme Court; and for this purpose it is given original jurisdiction. Jurisdiction to render indirect judgments against states exists in all the courts within the United States. The Supreme Court of the United States has jurisdiction to render indirect judgments against states as an incident of its appellate jurisdiction, by virtue of which it reviews, on appeal, writ of error, or certiorari, judgments of the subordinate courts of the United States in all cases within their jurisdiction, and also judgments of the Supreme Courts of the States in cases arising under the Constitution of the United States.

The execution of the direct judgments of the Supreme Court against a state is supervised by that Court directly. In the case of indirect judgments of the Supreme Court against a state by virtue of its appellate

jurisdiction, the Supreme Court remands the case to the court below for judgment in accordance with its decision, and for execution of the judgment so to be rendered; and that court supervises the execution of the judgment. If, however, a state should oppose the execution of such an indirect judgment, the Supreme Court would doubtless participate in supervising the execution in every way permitted by the Constitution and statutes.

The compulsory execution of any judgment of the Supreme Court against a state, whether the judgment be rendered indirectly in an action between individuals or corporations affecting states' rights, or directly in an action to which the defendant state is a party, proceeds on the same general principles. The judgment of the Supreme Court is in both cases an act of the United States; the opposition of a state to the execution of the judgment is in both cases the opposition of the State to an act of the United States. In order, however, to simplify the inquiry, it will be assumed in the following discussion of the nature, the source, the extent, and the manner of exercise of the power of the United States which is exercised in compelling the execution of a judgment of the Supreme Court against a state, that the judgment has been rendered directly against the state in the exercise of the original jurisdiction of the Court.

THE NATURE OF THE POWER OF EXECUTION

In all civilized countries in which the Roman or the English system of law prevails, courts not only hear causes of disputes between individuals or corporations and render judgment, but also take certain action, after judgment, for the purpose of carrying the judgment into effect by compulsion, if compulsion proves

to be necessary. The putting of a judgment into effect, by compulsion if found to be necessary, is called the execution of the judgment.

All compulsory execution of governmental acts or decrees is, as the name execution implies, an exercise of the executive power of the state or nation. When courts take action for the compulsory carrying into effect of their judgments, they exercise executive, not judicial power. (Edmund Randolph, attorney general of the United States, 1793, in the argument of the case of Chisholm *vs.* State of Georgia, 2 Dallas, 419, 428, said: "Perhaps, if a government could be constituted without mingling at all the three orders of power, courts should in strict theory, only declare the law of the case, and the subject upon which the execution is to be levied; and should leave their opinions to be enforced by the executive power."

Chief Justice Jay, in delivering his opinion in the same case (p. 478) said: "In all cases of actions against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings by the arm of the executive power."

In the case of U. S. Bank *vs.* Halstead, 10 Wheaton, 51, decided in 1825, Justice Thompson, in delivering the opinion of the court (pp. 61, 62, 64) said: "The power given to the courts over their process is no more than authorizing them to regulate and direct the conduct of the marshal, in the execution of the process. . . . It is a power incident to every court from which process issues, to enforce upon such officer a compliance with his duty, and a due execution of the process according to its command.")

An execution is only one form of the compulsory process of courts in the issuance of which courts exercise executive power. Subpœnas to compel the attend-

ance of parties or witnesses, attachments of property pending suit, temporary injunctions, orders to produce testimony, as well as executions upon judgments, are manifestations of executive power wielded by the courts.

Accordingly, the compulsory writs issued by courts, including writs of execution, are not in the name of the court, but in the name of the chief executive of the state or nation of which the court is an organ; or in the name of the state or nation; or in the name both of the state or nation and of the chief executive. (In Freeman on *Executions*, ed. 1900, Vol. 1, §§ 1, 39, it is said: "The writ of execution is a written command or precept to the sheriff or ministerial officer in writing and under the seal of the court, directing him to execute the judgment of the court. . . . The command of the writ may as properly be regarded as the command of the law as of the court. . . . It has always been the custom in England to issue the writ in the name of the reigning sovereign, and in the greater portion of the United States in the name of the state or of the people of the state."

Blackstone (vol. 4, p. 122), speaking of "Contempts against the King's Prerogative," says that such contempts "may also be . . . by disobeying the King's lawful commands; whether by writs issuing out of courts of justice, or by summons to attend his Privy Council.")

In the courts of the United States, in pursuance of the evident purpose of the Constitution that the United States shall be sovereign and supreme within its allotted sphere, and the clear command of the Constitution that the President shall exercise the executive power of the nation, all writs of compulsory process have always been in the name of the President, as chief executive of the United States; the full formula for the beginning

of all such writs being "The United States of America, ss: The President of the United States of America, To ——— Marshal, etc., Greeting:" Then follows a recital of the facts on which the action of the Marshal is to be based, and a command to the Marshal to take the compulsive action specified. (For the forms of writs in the United States courts see Appendix of Forms in *The Statutory Jurisdiction and Practice of the Supreme Court*, by P. Phillips; also in *Jurisdiction and Procedure of the Supreme Court of the United States*, by Hannis Taylor; also in *A Treatise on Federal Practice*, by Roger Foster.)

The principle that all compulsory process of the United States courts shall be in the name of the President, as Chief Executive of the United States, is not established by any act of Congress or by any executive order of the President, but by a rule of the Supreme Court of the United States, adopted at its first session in 1790, and ever since continued as a fundamental and unalterable principle of action of the United States courts in the issuing of compulsory process of any kind. At the first session of Congress held in 1789, the first action taken by the Senate, on April 1, was to appoint a committee, with Senator Oliver Ellsworth (afterwards chief justice of the United States) as chairman, "to bring in a bill for organizing the judiciary of the United States." The bill was brought in on June 15 and was debated on eighteen days. After having been recommitted and reported back on July 13, it was passed by the Senate on July 17. This bill contained no provisions concerning process, except that by the 14 section all the United States courts were authorized to issue "writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of

their respective jurisdictions, and agreeable to the principles and usages of law."

The House of Representatives held the bill as passed by the Senate under consideration for nearly two months, there being considerable opposition to the system of circuit and district courts proposed; but on September 17 accepted the bill in principle though with amendments respecting details. The details were adjusted and the bill became a law on September 24.

On September 17, when it was evident that the bill for organizing the courts was certain to be adopted the original Senate committee which had reported the bill for organizing the judiciary reported, through Senator Richard Henry Lee of Virginia, a bill "to regulate processes in the courts of the United States" which was passed by the Senate on September 19. This bill provided that "all writs or processes, issuing out of the Supreme or Circuit Courts, shall be in the name of the President of the United States." The House of Representatives objected to this provision and amended the bill so as to require all such writs and processes to be "in the name of the United States."

The only speech in either House on this amendment, preserved in the *Annals of Congress*, is that of Mr. Stone, of Maryland. Speaking in favor of the House amendment, he said, as reported in the *Annals of Congress* on September 25:

"He thought substituting the name of the President, instead of the name of the United States, was a declaration that the sovereign authority was vested in the executive. He did not believe this to be the case. The United States were sovereign; they acted by an agency, but could remove such agency without impairing their capacity to act. He did not fear the loss of liberty

by this single mark of power; but he apprehended that an aggregate, formed in one inconsiderable power and another inconsiderable authority, might, in time lay a foundation for pretensions it would be troublesome to dispute, and difficult to get rid of. A little prior caution was better than much future remedy."

Both Houses insisted on their respective views and a conference committee failed to find a solution for the dispute. On September 28, the Senate amended the bill by striking out the whole sentence above quoted concerning the style of the writ, by omitting all reference to the Supreme Court in the section in which it occurred, and by providing that in the circuit and and District Courts "the forms of writs and executions, *except their style*, and modes of process" should be as therein specified—thus leaving the styles of writs and executions in all the courts of the United States to be determined by rule of the Supreme Court or by a statute to be subsequently enacted.

The Supreme Court, consisting of John Jay, as chief justice, James Wilson, of Pennsylvania, William Cushing, of Massachusetts, and John Blair, of Virginia, held its first session, according to the provisions of the Judiciary Act of 1789, on February 1, 1790, and on February 3, 1790, adopted a rule on the subject of the style of writs, which in substance has remained unchanged to this day. In its original form the rule was as follows (2 Dallas, 399):

"Ordered, That (unless, and until it shall be otherwise provided by law),all process of this court shall be in the name of the President of the United States."

Congress in 1792, passed a fuller statute relating to processes in the United States courts, expressly excepting from the statute "the style of writs" and giving the Supreme Court power to modify by rule the method

of proceeding on execution specified by the statute and power to make rules for the Circuit and District Courts. Under the statutes relating to process above referred to, the practice seems to have been adopted by the Supreme Court, and also by the Circuit and District Courts without any special rule or order being made on the subject, of issuing all writs of compulsory process in the form stated in the text, namely "The United States of America ss. The President of the United States," etc. It seems reasonable to infer that this form was selected with a view to meeting the demand of the Senate that all compulsory process should be in the name of the President, and of the House of Representatives that it should be in the name of the United States. The meaning of the formula seems to be that the compulsory processes of the United States are the commands of the United States, as sovereign, acting by the President, as chief executive of the United States, addressed to the ministerial officers of the United States. By adoption of this formula, it was made clear that resistance to the lawful acts of the marshal is a crime against the sovereignty of the United States of the nature of treason, and not a crime against the court or the executive in the nature of a contempt; and that the President in enforcing the process of the United States courts does not act as a sovereign, but as chief executive of his sovereign, the United States.

The courts of the United States, in thus wielding the executive power of the United States, authenticate or, as the legal expression is, "teste" the writ of the President. This authentication is provided for by act of Congress. In the Supreme Court, the authentication or "teste" is by the Chief Justice; but even he does not actually sign the writ, the actual signature, according

to the statute, being by the clerk of the Supreme Court. (The first section of the Process Act of 1789, which has continued to this day, provided that "all writs and processes issuing from the Supreme or a Circuit Court shall bear test of the chief justice of the Supreme Court, and if from a District Court, shall bear test of the judge of such court, and shall be under the seal of the court from which they issue; and signed by the clerk thereof.")

A writ of execution of a judgment of the Supreme Court of the United States against a state, is thus the act of the United States of America, as sovereign within its sphere, and of the President of the United States, as Chief Executive of the United States, authenticated by the Supreme Court, addressed to the subordinate executive officer of the United States designated by the statute for the purpose—the United States marshal at large, styled by the statute the marshal of the Supreme Court, advising him of the judgment rendered, specifying the mode of execution, and commanding him to execute the judgment in the manner specified. (By sections 219 and 224 of the Judicial Code of 1911, the marshal of the Supreme Court is appointed by the Court and is required to "serve and execute all process and orders issuing from it.") As the marshal acts in the name of the United States and of the President, the writ calls into operation the whole moral influence of the United States, to be wielded by the President as Chief Executive and the whole physical force of the United States, if need be, to be wielded by the President as Commander-in-Chief of the Army and Navy of the United States and of such part of the militia of the states as may be summoned into the service of the United States by authority of Congress and by executive order.

THE SOURCE OF THE POWER

The question arises: By what constitutional authority do the courts of the United States thus wield the executive power of the United States in the name of the Chief Executive? The executive power of the United States is by section 1, article II, of the Constitution, "vested in a President of the United States." The judicial power of the United States is, in equally clear and precise words, by section 1, article III, "vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Congress is by section 8 of article I and by other provisions of the Constitution granted certain specific powers, but none of these provisions has any bearing on the question except the tenth clause of section 1 of article VIII, which provides that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

It is evident from the whole Constitution and from the words and acts of the framers in the Constitutional Convention that the United States courts were intended to have the usual executive powers of courts; and the almost unanimous view of legislators, executives, and courts has always been that these executive powers are derived from the grant of "the judicial power" made by the Constitution to the Supreme Court and to the other courts of the United States, as being necessarily implied in that power by the custom and usage of civilized nations.

Courts have exercised this incidental executive power over their process in aid of their jurisdiction for many

centuries. The practice apparently arose in the last days of the Roman Empire. Under the Roman system of early days, the judgment plaintiff was permitted, by proceedings before the magistrate, to seize the person of the judgment defendant in satisfaction of the judgment and keep him in slavery. Later on, the seizure of all the property of the judgment defendant by the judgment plaintiff was substituted for enslavement. At a later period, the *praetores*—the local chief executives—authorized or instituted arrangements for making a division of the debtor's property among all his creditors. In the last days of the Roman Empire, the *praetor*, after rendering judgment in person or by a judge appointed by him, attended to the execution of the judgment, using military force if necessary. Both in rendering judgments and in executing them, all the Roman judicial tribunals and executives acted in the name of the emperor. From this system it resulted that the judicial tribunals gradually came more and more to superintend the execution of judgments. (See *The Institutes of the Roman Law*, by Dr. Rudolph Sohm (translated by Ledlie, 2d ed., 1901), p. 317.) Doubtless this produced a human and reasonable execution of the orders and judgments of these tribunals; for the practice was taken over into the judicial system of Continental Europe and of England at an early date. In England, failure of the sheriff to obey the lawful commands of the court was by statute made a crime of the nature of contempt, and resistance to an officer in executing the lawful commands of the court was made a crime of the nature of treason. The practice passed from England to the American Colonies, and they continued it when they became states, though their constitutions recognized the division of powers into the legislative, executive, and judicial, and placed

each power in charge of a special governmental organ.

Under the circumstances it was natural that the framers of the Constitution should have refrained from inserting in it an express grant to the courts of the United States of all the executive powers then exercised by courts of the states. Such a grant would have been inconsistent with the division of powers made by the Constitution. Moreover it was unnecessary, since the people of the states and the states themselves were logically forced either to recognize that the United States courts had these executive powers as an incident of "the judicial power" granted to them, or to revolutionize the practice of the state courts.

In view of the fact that the Constitution makes no express grant of these executive powers to the United States courts and that these powers are derived by implication from the grant of the judicial power, Congress has always refrained from enacting any statute which should purport to grant to the United States courts these executive powers. Such an act, if passed, might have been claimed to show that Congress considered that no warrant could be found in the Constitution for the exercise of such powers; and there would have been danger that such a statute might have been held unconstitutional as an attempt by Congress to confer executive powers on the judiciary. Congress has, however, by various statutes, passed at various times, recognized that the United States courts have power, under the Constitution, to issue and control all necessary compulsory process in aid of their jurisdiction, as a power derived from the Constitution, and has by statute effectuated and regulated the exercise of these powers. Thus in 1789, Congress by the fourteenth section of the Judiciary Act, empowered the United

States courts to issue the writs of *habeas corpus* and *scire facias*, "and all other writs which may be necessary for the exercise of their jurisdictions, and agreeable to the principles and usages of law." This Judiciary Act also provided for the appointment of a United States marshal to attend the United States courts in each district, and required the marshal to "execute all lawful precepts directed to him and issued under the authority of the United States," giving him power "to command all necessary assistance in the execution of his duty." The Process Act of 1789 provided for the manner in which "all writs and processes" of the United States courts should "bear teste." By this act as finally amended in 1792, certain general principles were established as respects process in actions in the United States courts, and they were authorized to make rules regarding process, not inconsistent with the statutes, subject to the general rules provided by the Supreme Court. These statutory arrangements have continued with slight changes to this day.

The Supreme Court, as was to be expected, has always firmly asserted its power and the power of all the United States courts to issue all compulsory process necessary for the exercise of their respective jurisdictions. It has held that this power is derived by necessary implication from the grant of "the judicial power," and is exercised by the courts according to the principles established by Congress in its legislation for effectuating and regulating the exercise of the power, and according to the rules of court, not inconsistent with the statutes, these rules being governed by the general rules prescribed by the Supreme Court. (In the case of Wayman *vs.* Southard, 10 Wheaton, 1, decided in 1825, Chief Justice Marshall, delivering the opinion of the court, said (pp. 21, 23):

"One of the counsel for the defendants insists . . . that the government of the Union cannot, by law, regulate the conduct of its officers in the service of executions on judgments rendered in the Federal Courts; but that the state legislatures retain complete authority over them. The court cannot accede to this novel construction. The Constitution concludes its enumeration of granted powers with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment. That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. . . . The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until the judgment is satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act [the section of the Judiciary Act giving the United States courts power to issue all writs necessary to the exercise of their jurisdiction] to suppose an execution necessary for the exercise of jurisdiction."

In the case of United States Bank *vs.* Halstead, 10 Wheaton, 51, decided in 1825, Justice Thompson, delivering the opinion of the court (p. 64), said:

"An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all pro-

ceedings on the execution are proceedings in the suit, and which are expressly, by act of Congress [the Process Act] put under the regulation and control of every court from which process issues."

See also Gordon *vs.* the United States, 117 U. S., 697, 702, 704.

The provision of the process Act of 1789, authorizing the United States courts to issue all writs "which may be necessary to their respective jurisdictions, and agreeable to the usages of law" has never been changed. (See sec. 262 of the Judicial Code of 1911.) Nor has the provision relating to the manner in which process shall bear teste. (See Revised Statutes U. S., sec. 911)

In *Ex parte* Siebold, 100 U. S., 371, Mr. Justice Bradley, delivering the opinion of the court, said:

"We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the power and functions that belong to it. . . . It must execute its powers or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction.")

THE EXTENT OF THE POWER

Congress has never attempted to define the limitations upon the power of the Supreme Court in cases of which it has original jurisdiction. In these cases, the court by its own interpretation of the constitutional

grant of power, determines both the limitations of its own jurisdiction and the extent of its executive powers in issuing compulsory process in aid of its jurisdiction. The rules concerning execution of judgments which Congress has enacted apply to cases in the Supreme Court of which it has appellate jurisdiction and to all cases in the other courts of the United States. These rules are, that execution in actions at law shall be levied in the same manner as in a court of the state in which the execution is levied, and that execution in actions of equity and admiralty shall follow the rules observed in equity and admiralty courts at the time the Constitution was adopted. These provisions are no doubt to be observed by the Supreme Court in cases of its original jurisdiction, so far as they are applicable.

Inasmuch as the Supreme Court, in cases of its original jurisdiction, determines the limits of its jurisdiction, it has power to hold that it has no jurisdiction in particular classes of cases between states, to determine what kinds of property of the defendant state are entitled to exemption from execution, and to establish the principles upon which it will act in refusing on grounds of public policy to issue a writ of execution. When it holds that it has no jurisdiction of a designated class of cases between states the decision necessarily also operates as a limitation upon the executive powers of the court. Whenever it holds that certain kinds of property owned by states are exempt from execution, and whenever it denies a motion for a writ of execution against a state on grounds of public policy, it plainly establishes limitations upon its executive powers.

The Supreme Court has held that it has no jurisdiction of cases between states in which the complaining state comes before the court "as *parens patriæ*, trustee, guardian or representative of all its citizens," seeking

reparation from the defendant state for some injury done by it acting in a similar representative capacity for all of its citizens; but that those cases between states only are justiciable which have for their purpose the obtaining of reparation for "a special and peculiar injury" committed by the defendant state on the plaintiff state of such character "as would sustain an action by a private person." (State of Louisiana *vs.* State of Texas, 176 U. S. 1, 17.)

The Supreme Court has never yet had occasion to decide to what extent the Constitution limits the jurisdiction of the Supreme Court by confining its jurisdiction to "controversies between two or more states." The Judiciary Act of 1789 interpreted the word "controversies" by using the expression "civil controversies." Justice Iredell in the case of Chisholm *vs.* State of Georgia, 2 Dallas, 419, 431, stated that the word "controversies" was used so as to exclude all criminal cases, from which it would appear to be a natural inference that the Supreme Court has no jurisdiction of actions between states which are based on an alleged wrongful motive or intent of the defendant state.

The Supreme Court has held that "the public property held by any municipality, city, county, or state is exempt from seizure upon execution, because it is held by such corporation, not as a part of its private assets, but as a trustee for public purposes." (In the case of South Dakota *vs.* North Carolina, 192 U. S. 286. Opinion of the court by Justice Brewer, p. 318.)

The court has also held that it will not issue an execution upon a judgment against a state when it appears that the state has no means of satisfying the judgment except through the exercise of its taxing power. (Rees *vs.* City of Watertown, 19 Wallace, 107, 116, 117.)

In the case of Virginia *vs.* West Virginia, which is now

pending in the Supreme Court, on a motion for an execution on a money judgment of $12,000,000 and interest rendered in favor of Virginia, a claim is made by West Virginia that the Supreme Court has no power to issue execution on a money judgment against a state. The court has denied the motion for execution, in order to give the legislature of West Virginia an opportunity to provide for the payment of the judgment. If no such provision is made, however, Virginia has permission to renew the motion for an execution, and the court will doubtless decide upon the point raised by West Virginia.

During the time that the American Union existed under the Articles of Confederation, suits by individuals against states were sometimes brought in state courts and the rule was then established that no action for a money judgment would lie against a state, on the ground that a state court could not enforce execution of such a judgment. (Nathan *vs.* Commonwealth of Virginia, 1 Dallas, 77.) Only in cases where property belonging to a state was found within the jurisdiction of the court of another state, could the court take jurisdiction, and not even then unless the suit was *in rem*, that is, against the property itself, to determine the title to it or liens upon it. It was thought inconsistent with state sovereignty that any compulsion should be placed upon a state on account of a contract debt; and, to avoid the question of execution, the state courts declined to take jurisdiction. That all compulsion of states is war, is self-evident. Hamilton, in No. 81 of the *Federalist*, recognized this when he said, arguing against the jurisdiction of the United States courts in actions brought by individuals on debts due by the states: "To what purpose would it be to authorize suits against states for the debts they owe? How could

recoveries be enforced? It is evident that it could not be done without waging war against the contracting state: and to ascribe to the Federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence would be altogether forced and unwarrantable." The sentiment of civilized mankind seems to be crystallizing on the proposition that an unpaid debt is not adequate as a cause of war. Although the Convention respecting the Limitation of Force in the Recovery of Contract Debts adopted by the second Hague Conference permits the use of force when the debt has been reduced to judgment by an arbitral award, nevertheless the principle underlying that Convention is the broad principle above stated—that an unpaid debt is not an adequate cause of war; so that ultimately the Convention may be extended to cover even contract debts reduced to judgments. The claim made by West Virginia in bar of the power of the Supreme Court to issue execution on a money judgment may, therefore, quite possibly be upheld by the Supreme Court.

The only case in which the court has ever taken proceedings of the nature of execution, after judgment against a state, would appear to be that of the State of South Dakota *vs.* State of North Carolina, but in this case there was property of North Carolina not used by it for any public purpose which was within the control of the court. (192 U. S. 286.) The suit was brought by South Dakota on bonds owned by it which had been issued by North Carolina, and which were secured by railroad stock owned by North Carolina and mortgaged by it to the holder of the bonds to secure their payment. The court rendered judgment on the bonds and ordered the mortgaged stock sold by the marshal

of the Supreme Court on foreclosure. Though the proceeding was not *in rem*, yet it may be claimed to fall within the principle applied by the state courts in suits against states during the period of the Confederation.

In considering the extent of the power of the Supreme Court to execute judgments against states, it is proper always to bear in mind that the executive powers were conferred on courts in the days when courts dealt only with individuals as litigants. The reasons for conferring and continuing these powers doubtless were that the courts proved themselves to be able, through the sheriff, aided by the *posse comitatus*, to execute their judgments against individuals, and to execute them more conveniently, more expeditiously, more humanely, and more justly, than the executive department of the goverment. These reasons do not apply to courts which deal with states as litigants, in which execution of the judgment is only another name for civil war. The marshal with all the assistance he can command is powerless in dealing with a state. If judgments against states are to be executed, the combined moral influence of the Supreme Court, the President, and the Congress must be exerted, the special responsibility resting upon the President, and the whole physical force of the United States must be used, if necessary to maintain the majesty and power of the United States and its legal right of supremacy when acting within its allotted sphere. In the case of Chisholm *vs.* State of Georgia, 2 Dallas, 419, Justice Blair said (p. 451):

"Nor does the jurisdiction of the court, in relation to a state, seem to be questionable, on the ground that Congress has not provided any form of execution, or pointed out any mode of making the judgment against a state effectual. The argument *ab inutili* may weigh much in cases depending upon the construc-

tion of doubtful legislative acts, but can have no force, I think, against the clear and positive directions of an act of Congress and of the Constitution. Let us go on as far as we can; and if, at the end of the business, notwithstanding the powers given us in the fourteenth section of the judicial law [the power to issue all writs necessary for the exercise of jurisdiction], we meet difficulties insurmountable to us, we must leave it to those departments of government which have higher powers; to which, however, there may be no necessity to have recourse. Is it altogether a vain expectation that a state may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the Supreme Court of the United States, though not conformable to [its] own ideas of justice?"

It is doubtless in view of this impossibility of courts going very far in executing judgments against states that all the tribunals of which history gives us information which have been granted jurisdiction in controversies between states or nations have not been endowed with any executive powers, but have been compelled to rely upon an agreement of the litigants in advance to abide by the judgment or to certify their judgments to an executive upon which the responsibility for executing the judgment or declining to execute it, was placed.

Thus the Imperial Chamber established in 1495, in the Holy Roman Empire, which is referred to by Hamilton, in No. 80 of the *Federalist*, as the prototype of the United States Supreme Court regarded as a tribunal for the pacific settlement of interstate disputes, had no executive powers; but only certified its judgments to the Imperial Council, which with the Emperor constituted the executive and legislature of the Empire.

The Imperial Council decided whether or not to execute the judgment, and determined the manner and form of the execution in each case. (*Geschichte der Deutschen*, by M. I. Schmidt, (ed. 1808), vol. 4, pp. 364, 390.)

The various political committees of the English and British Privy Council which had jurisdiction to hear and determine intercolonial disputes and disputes between the colonies and the mother country, had no executive powers, but merely certified their judgments to the King by way of advice to him; and he, advised by his whole Council, as chief executive, determined the question of execution. (The final section of the Instructions of Charles II to the Council of Foreign Plantations, of December 1, 1660, was as follows: "You are hereby required and empowered to advise, order, settle, and dispose of all matters relating to the good government, improvement, and management of our foreign plantations or any of them, with your utmost skill, discretion, and prudence; and in all cases wherein you shall judge that further powers and assistance shall be necessary, you are to address yourselves to us and our Privy Council for our further pleasure, resolution, and direction therein." (*The Administration of Dependencies*, by A. H. Snow, p. 82.)

The Permanent International Arbitration Court established by the first Hague Conference has no executive or legislature to execute its awards. In lieu of this, litigant nations are required to agree in advance to accept its award. (Convention for the Pacific Settlement of International Disputes, Art. 18 (1899); Art. 37 (1907); printed in *The Hague Conventions and Declarations of 1899 and 1907*, edited by James Brown Scott, pp. 55, 56. The Draft Convention relative to the creation of a Judicial Arbitration Court approved by the Second Hague Conference

(printed in the same volume, pp. 31–39) has no provision for the execution of the judgments of the proposed court, nor does it appear that the nations which should adopt the convention would obligate themselves to conform to these judgments.)

This is plainly compulsion; for though the nations are free to use the tribunal or not, it is impossible for any nation to use it without placing itself under moral obligations to the other nation and to the Society of Nations. The moral influence of the court is thus diminished and no method is provided for executing its awards. It seems clear that courts having jurisdiction in controversies between states or nations should either give judgments which the litigants are free to accept or reject—in which case the moral influence of the court would have its maximum effect—or else should, as organs of a compulsive union of states, have their judgments executed by the executive and legislature of the compulsive union.

The Articles of Confederation provided for the establishment of tribunals for the pacific settlement of disputes between states, but made no definite provision for enforcing them. The framers of the Constitution in conferring on the Supreme Court "the judicial power" in "controversies between two or more states"; in vesting in the President "the executive power" and requiring him "to take care that the laws are faithfully executed"; and in giving Congress power to effectuate these powers, evidently considered that the Constitution, as a whole, made adequate provision for the execution of judgments of the Supreme Court rendered against states in cases where such execution was proper; but none of them seems to have thought that the responsibility of the Supreme Court in executing such judgments was exclusive, or was without great limitations.

(James Wilson, speaking on December 7, 1877, in the Pennsylvania Convention called to consider the ratification of the Constitution of the United States, said: "This power [to determine controversies between states] is vested in the present Congress, but they are unable, as I have already shown to enforce their decisions. The additional power of carrying their decrees into execution, we find is therefore necessary, and I presume no exception, will be taken to it." *Pennsylvania and the Federal Convention*, by John Bach McMaster and Frederick D. Stone, p. 356.)

In the great case of Chisholm *vs.* State of Georgia—the first case in which the powers of the Supreme Court were considered, decided in 1793, Chief Justice Jay said:

"In all cases of actions against states or individual citizens, the National Courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive power; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a state, and the case of the United States, in very different points of view." (2 Dallas, 419.)

Congress, recognizing the constitutional duty of the President to come to the aid of the Federal Courts when necessary to execute their judgments, effectuated his powers by statute in 1792, and 1795, authorizing him to use the armed forces of the United States for this purpose. This statutory provision, though amended at various times, has always remained on the statute books. In its original form the statute made the President's action dependent upon a written notification received by him from the chief justice or an associate justice of the Supreme Court of the United States; but this limitation was soon repealed, and the question of

the interposition of the President was left to be determined by the President, thus relieving the Supreme Court of any odium which the use of military force might involve.

President Madison, writing to Governor Snyder of Pennsylvania on April 13, 1809, acknowledging receipt of a copy of a Pennsylvania statute designed to conform to a judgment of the United States Court, said:

"The Executive is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is especially enjoined by statute to carry into effect any such decree, where opposition may be made to it." (*Life and Writings of Madison*, Vol. 2, p. 438. The act referred to by President Madison was the act of May 2, 1792, authorizing the President to call forth the militia "to execute the laws of the Union, suppress insurrections and repel invasions" as modified by the act of February 28, 1795, enacted for the same purpose.

The statutes now in force on this subject are Sections 5298 and 5299,U. S. Revised Statutes. Section 5298 contains the substance of the original act of 1792, and in addition authorizes the President, "whenever it shall become impracticable, in the judgment of President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any state or territory, to employ, not only the militia, but also "such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion."

See also section 3493, which is a part of the chapter relating to civil rights under the fifteenth amendment. By this the President is authorized "to employ such part of the land or naval forces of the United

States, or the militia, as may be necessary to aid in the execution of judicial process issued under any of the preceding provisions."

Chief Justice Taney, in a case decided by him in the United States Circuit Court in 1861, said:

"In exercising the power to 'take care that the laws are faithfully executed,' the President is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the coordinate branch of the government to which that duty is assigned by the Constitution. It is thus made his duty to come to the aid of the judicial authority, if it is resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments." (*Ex parte* Merryman, 17 Federal Cases, 149.)

By "subordination" Chief Justice Taney doubtless meant not subordination in the legal sense, but in the philosophical sense. His idea was evidently that the President in executing the judgments of the Federal Courts was to act promptly and strongly as a military commander, but only for the purpose of executing the judgment in the same manner as the court itself would have done; thus subordinating the power of the United States to those great and fundamental principles of equality and justice which have always influenced courts in executing their judgments.

It seems reasonable to conclude, therefore, that inasmuch as all executive powers exercised by courts have their origin in public policy, and inasmuch as the Executive may properly exercise these powers in cases in which the Courts prefer not to exercise them on grounds of public policy, or are unable to exercise them, the Supreme Court may, in controversies between states of

which it has jurisdiction, proceed with the execution to any extent that it deems proper, or may refuse to exercise its executive powers altogether; its action being determined by considerations of public policy. Its failure to act does not necessarily mean that the judgment will not be executed; for the President is authorized by the Constitution to execute judgments of the United States courts, and is able to do so if furnished by Congress with the requisite force. In executing a judgment of the Supreme Court against a state, the President doubtless has constitutional power to act on his own initiative in aid of the court; but probably in practice the court would, in most cases, certify the judgment to the President, either leaving it wholly to him and to Congress to decide whether to execute it and in what manner, or making recommendations as to the course to be followed. Since the above was written, an attempt has been made to institute a new method of procedure in aid of execution of judgments rendered by the Supreme Court against States. On February 5, 1917, the State of Virginia filed in the Supreme Court a bill for a mandamus in aid of execution in the case of Virginia *vs.* West Virginia, to which case reference has been made above. To this bill all the persons constituting the whole legislative body of West Virginia were made parties defendant. The object of the mandamus proceeding was to compel these defendants in their official capacities, as together constituting the legislative body of West Virginia, to levy a tax to pay the judgment. The authorities cited by Virginia, in its brief in support of its application for a rule to show cause, were the cases in which the Supreme Court has sustained the action of the Circuit Courts of the United States in issuing writs of mandamus against taxing officers

of municipal corporations, in aid of the execution of the judgments of these courts against these municipal corporations, compelling these officers to levy taxes to pay the judgment, in compliance with State laws imposing this duty upon the municipal officials. The case of Louisiana *vs.* Jumel. 107 U. S. 711, 727, 728, is particularly relied upon. In the cases above referred to, the United States Courts exercised no compulsion upon the State; they only compelled municipal officers to act as the State, by laws already enacted, had directed them to do. The object of the mandamus proceeding in the Virginia-West Virginia case is to exercise compulsion upon the State, by requiring State officials, assembled as the supreme legislature of the State, to enact new laws. The claim is made by Virginia that the voluntary submission of West Virginia to adjudication of the claim of Virginia against it by the Supreme Court, was a voluntary submission to compulsion by the Supreme Court, as respects its supreme legislative action, for the benefit of Virginia.

THE MANNER OF EXERCISING THE POWER

The executive power proceeds in its work of making effective the just commands of the state or nation partly by means of conciliation and partly by means of force. The chief executive of a state or nation wields the collective moral influence of its people and their united physical force. It is gradually being perceived that the best and most lasting results can be obtained by inducing voluntary obedience to the commands of the state through conciliation, and that the highest use to which the physical force of the state can be put is to protect the dignity of the state and of its agencies so that they

may effectively pursue their conciliative work and bring about just government by the consent of the governed.

If the President were called upon to execute a judgment of the Supreme Court, he would, if he accepted the above principles as the true principles of executive action, first of all satisfy himself that the decision was constitutional and according to law; for it is conceivable (though in the highest degree unlikely) that a judgment even of the Supreme Court might itself be unconstitutional or contrary to law. President Jackson, in his Proclamation of December 11, 1832, warning South Carolina against attempting to nullify the United States tariff act, said: "There are two appeals from an unconstitutional act passed by Congress—one to the judiciary, the other to the people and states." So from any judgment of the Supreme Court which involves considerations of a political nature, there is an appeal to the people and states; and the President, when called upon to execute a judgment of the Supreme Court against a state, would perforce give heed to the judgment of this majestic court of final appeal.

The President would also wish to be advised as to how he might execute the judgment so as not to interfere with the great principles of the Constitution; for though a judgment of a United States court is undoubtedly a law of the United States which the President is bound to cause to be faithfully executed, it is in the nature of a private law, even when it is a judgment of the Supreme Court against a state, and it must be executed so as to conform to fundamental principles.

But doubtless no President, upon receiving from the Supreme Court a judgment against a state of the Union properly certified, rendered in a case plainly justiciable as being capable of being determined by the principles

of law and equity as recognized by our own state and national courts and legislatures, in which the facts had been fully ascertained and the judgment rendered after due hearing and deliberation, would long hesitate to use his moral influence as Chief Executive of the Union and all the physical force of the United States which Congress had placed at his disposal, to compel execution of the judgment.

The provision of the Constitution that "the President shall take care that the laws are faithfully executed" seems generally to have been considered as sufficient authority in itself to enable the President to execute the constitutional powers of the United States whenever resistance is offered to them; but Congress has by many statutes effectuated this power of the President. It would therefore be proper for the President, in case he doubted whether existing statutes gave him sufficient authority to execute a judgment of the Supreme Court against a state, to ask Congress to legislate so as to supply him with the necessary means of exercising moral influence and so as to place adequate military and naval force at his disposal.

Perhaps also the President has authority, if he deems proper, to call upon Congress to act as a Council of Conciliation in bringing to bear the collective moral influence of the people of the United States on a state against which a judgment has been so rendered. By section 10 of Article I of the Constitution it is provided that "no state shall, without the consent of Congress . . . enter into an agreement or compact with another state." This necessarily implies that any state may, by the consent of Congress, enter into any agreement or compact with another state. The power given to Congress to consent to agreements between states would seem to imply, by reasonable implication, the

power in Congress to conciliate between states, in acute cases of dispute, so as to induce them to agree. In the case of State of Louisiana *vs.* State of Texas, 176 U. S. 1, Chief Justice Fuller, delivering the opinion of the court, said (p. 17): "Controversies between them [states of the Union] arising out of public relations and intercourse cannot be settled either by war or diplomacy, though, with the consent of Congress, they may be composed by agreement." But, though the President might thus perhaps call upon the Congress to act as the Council of Conciliation, it would doubtless be inexpedient to do so in case of any disputes which might lead to a division of Congress on sectional lines. In such cases it would be safer for the President to assume full responsibility and full power, as he has the constitutional right to do; only calling upon Congress to effectuate his powers, if necessary, by legislation.

Inasmuch as the execution by the President of a judgment of the Supreme Court against a state is an act of the same kind as the execution of an act of Congress, the precedents established by two of our greatest Presidents—Washington and Jackson—in compelling the execution of acts of Congress may properly be considered in this connection. These precedents show that it is essentially the moral and conciliating influence of the United States which the President is to exercise. Though he is to use the military and naval force of the United States to an overwhelming and irresistible extent, he is to use it essentially as his protector and as the protector of the majesty and dignity of the United States while engaged in the work of conciliation.

President Washington had occasion to compel the execution of an act of Congress in 1794. The Excise Act of 1791 was resisted in the four western counties of

Pennsylvania. At his request, Congress, passed laws making resistance to the execution of laws of the United States and of legal process of the United States courts a crime, and authorizing the President to use the militia in suppressing conspiracies for resisting these laws or judicial proceedings under them; it being provided that the warrant for the President's action should be a notification by the Chief Justice or an Associate Justice of the Supreme Court of the United States to the effect that such resistance had occurred. Washington, pursuant to the statute, issued a proclamation warning the conspirators and commanding them to obey the laws. He also appointed a Commission of Conciliation to confer with the conspirators. Speaking of the powers of this Commission Washington said, in his Address to Congress of November 19, 1794:

"They were authorized to confer with any bodies of men or individuals. They were instructed to be candid and explicit in stating the sensation which had been excited in the Executive, and his earnest wish to avoid a resort to coercion; to represent, however, that without submission, coercion must be the resort; but to invite them at the same time, to return to the demeanor of faithful citizens, by such accommodations as lay within the sphere of Executive power. Pardon, too, was tendered to them by the Government of the United States . . . upon no other condition than a satisfactory assurance of obedience to the laws."

When the Commission of Conciliation failed and President Washington was called upon in 1794 to take military action to suppress the rebellion, the warrant for his action, as he himself states in his message of November 19, 1794, was a notification, in pursuance of the statute of 1793, by "an Associate Justice of the Supreme Court of the United States that in the Counties

of Washington and Allegheny, in Pennsylvania, laws of the United States were opposed and the executing thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshal of that District." The Associate Justice who signed the notification was James Wilson, whose long and brilliant service, as a member of the Continental Congress, of the Constitutional Convention and of the Supreme Court, had already made him a leading authority in all questions of law and politics. In all that Washington did he had the benefit of the advice of Jefferson, as his Secretary of State, of Hamilton as his Secretary of the Treasury, of Jay as Chief Justice, and of Randolph as Attorney General. Pursuant to the statute of 1793, Washington called out the militia of Pennsylvania, Virginia, Maryland, and New Jersey, forming a force of fifteen thousand men, so strong in proportion to the rebels as to be irresistible. He himself took command, and the governors of Virginia, Maryland, and New Jersey rode at the head of their divisions. With this overwhelming force in evidence, Washington still persisted in his attempts at persuasion and conciliation. When the rebellion, was quelled, partly by persuasion and partly by force, he saw to it that the principal offenders were brought to trial and sentenced; but before he ceased to be President he pardoned all of them." (See *History of the United States* by Bryant and May, vol. 4, pp. 118–121.)

President Jackson, in exercising the executive power against the State of South Carolina, in 1833, when South Carolina threatened to nullify the protective tariff law of the United States, sent General Scott into the State with an overwhelming military force supported by a strong naval force, with instructions to

keep his overwhelming military and naval power in evidence, but to use every possible effort for conciliation. The result was an amendment of the law which satisfied South Carolina without sacrificing the protective tariff principle. (See *History of the United States* by Bryant and May, vol. 4, pp. 306–311.)

President Cleveland, in executing the powers of the United States over the mails and interstate commerce in the State of Illinois, during the railroad strike of 1894, acting under the constitutional provision requiring the President to take care that the laws are faithfully executed and under the existing statutes authorizing him to use the armed forces for this purpose, used a part of the army of the United States. His action was approved by resolution of both Houses of Congress and was held constitutional by the United States Supreme Court in a test case afterwards brought. (See *The Government and the Chicago Strike*, by Grover Cleveland; Address of Hon. Thomas M. Cooley, as President of the American Bar Association, in the *Reports of the American Bar Association for 1894*, p. 233; *Congressional Record, Senate proceedings for July 11, 1894; House proceedings for July 16, 1894.* See also *In re Debs*, 158 U. S., 564.) His action has been criticized on the ground that it was wholly repressive, and not directed towards conciliation; but it is questionable whether the resistance to the exercise by the United States of its constitutional powers was not so passionate and unreasonable that conciliation was impossible and the only course open was one of mere repression. However this may be, the precedents established by Washington and Jackson seem clearly to show that, though force—overwhelming and irresistible, since only by such force can the result be produced with the minimum of war—is to be used

by the United States, against opposition to its just and lawful action; nevertheless, in all cases where the opposition is based on reasonable grounds, this force is to be used only in aid of its conciliative influence. The failure of a State of the Union to conform to a judgment against it rendered by the Supreme Court would certainly be based on some reasonable ground, and if the United States, acting through the President, were called upon to execute such a judgment, it seems clear that every effort of every department of the Government should be directed towards accomplishing the result by conciliation; though prudence and policy would dictate the use of overwhelming and irresistible military and naval forces, to maintain the dignity and majesty of the United States while engaged in its conciliative efforts.

It is natural and proper that the Supreme Court, in controversies between States, looking forward to the difficulties in executing the judgment and the possibilities of civil war which every judgment against a State involves, should itself act, so far as possible, as a tribunal of judicative conciliation; seeking to induce litigating States to settle their dispute by agreement, and, when this proves impossible, appealing to those motives which should induce States of a Union to accept the lawful decrees of the tribunal appointed to adjudge their controversies.

In the case of State of Virginia *vs.* State of West Virginia, the Supreme Court has taken a decided step in this direction. In its opinion in that case, the Court, speaking by Justice Holmes, said:

"The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this Court may be

called on to adjust differences that cannot be dealt with by Congress or disposed of by the Legislature of either State alone. . . .

"As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to the Court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the effect of a conference between the parties, which, whatever the outcome, must take place. . . . This case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration, to bring it to an end." (State of Virginia *vs.* State of West Virginia, 220 U. S., 1, 27, 36.)

The Union has existed for one hundred and twenty-seven years since the Supreme Court was originally endowed with jurisdiction in controversies between States. Some of our States are thousands of miles distant from each other, and all are diverse from each other in climate, in racial composition, in tradition, and in their social and economic interests. Though the jurisdiction of the Court was not largely resorted to prior to the Civil War—doubtless on account of the acute nature of all questions relating to States' rights growing out of the dispute over the existence and extension of slavery—it has been used with increasing frequency since that time. Never yet, however, has it been necessary to compel the execution of a judgment against a State, rendered by the Supreme Court in the exercise of its original jurisdiction. The judgment in the Dred Scott case alone of all the judgments affecting States' rights and States' interests rendered

by the Supreme Court in the exercise of its appellate jurisdiction, has met with State opposition. The issues of the Dred Scott case are forever dead, and are buried under constitutional amendments. The Confidence of the people of the United States in its highest Court is supreme. They recognize their responsibility in upholding it in its unique position as the basis on which the whole fabric of our institutions rests. The States know that the Court will do justice without fear or favor in every case, whether of private or public interest. They feel a pride in preserving the full power and dignity of the great tribunal before which they appear as before an international court of justice. They are devoted to our Union. It is therefore but natural that decisions of the Court both in controversies between States and in cases affecting States' rights, should have been voluntarily accepted; and it is but reasonable to hope and expect that no compulsion will ever be necessary in these quasi-international controversies.

A LEAGUE OF NATIONS ACCORDING TO THE AMERICAN IDEA

A LEAGUE OF NATIONS ACCORDING TO THE AMERICAN IDEA

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THE so-called "Covenant of the League of Nations" has the form of a treaty, but it is something different from and more than a treaty—that is to say, it is a constitution. It was, in fact, originally so called. If adopted, it would constitute a new composite body politic and corporate, which would be a union of States, of which the United States would be a member. This new body politic and corporate would have a political and legal personality distinct from that of the United States. It would have a specific name—the League of Nations. It would manifest its personality through a common organ, which would sit in two divisions—one called "the Council," and the other "the Assembly." To this common organ the constituent States would delegate specific political and corporate powers, thereby renouncing the exercise and wielding of these powers to the common organ. The act of ratifying any treaty which contains this "covenant" would be an act of consent on the part of the United States to enter into a union with foreign States, and for a period of time more or less definite to participate and partially submerge its personality in this new union. The power which the United States would exercise in

entering into and participating in the union would not be the treaty power proper, but the analogous but vastly greater power of union. Specifically the power thus exercised would be the power of political union, the supreme phase of the power of union.

The first question presented by the subject assigned for this paper—a League of Nations According to the American Idea—therefore is, What is the American Idea, and what is its effect upon the power of the United States to enter into and participate in unions with foreign States?

The American Idea, held by the American people from the foundation of the American colonies and ever since held by them, was formulated in the Declaration of Independence in these words:

> We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

This statement of "self-evident truths," as is now generally agreed by publicists who have investigated its sources, is a summary and synthesis of the results of the work of the Protestant theologian-lawyers of the sixteenth, seventeenth, and eighteenth centuries. It is a translation of the Ten Commandments of the Old Testament and the Two Great Commandments of the New Testament, which in the Bible are expressed in terms of fundamental divine command and fundamental divinely imposed duties applicable to all men, into terms of fundamental law and fundamental rights applicable to all men. The translation of the Biblical Commandments into the fundamental law of personal

conduct and the fundamental rights of men against men was made in 1536 by John Calvin, in the chapter on "The Moral Law" of his "Institutes of the Christian Religion." In 1594 Richard Hooker, in the first book, "Concerning Laws and Their Several Kinds in General," of his "History of Ecclesiastical Polity," derived from Calvin's principles the idea of government by the consent of the governed and of governments as agents of the governed.

Bishop Benjamin Hoadly, in 1710, taking Hooker's argument as his basis, evolved the idea, in his "Essay on the Origin and Institution of Civil Government," of the unalienability of the fundamental rights of men, and from this thesis derived the rights of men against governments, and the duties of governments to secure the unalienable rights of men against each other. The political doctrines of Calvin and Hooker had become the basis of the liberal thought of Europe at the time the American colonies were founded, and were by the American colonists accepted as self-evident truths. The British and American liberals of 1710 accepted Hoadly's doctrine as completing that of Calvin and Hooker, and the composite doctrine of these three philosophers became the principles of the British Whig party and of the American colonists. Against the Tory and Imperialist reaction in Great Britain, the Americans insisted upon their traditional principles, making their own declaration of them, and successfully maintained these principles by revolution.

The words of the Declaration, when read as an exposition of the legal and political meaning of the Biblical Commandments, are easy to be understood. The equal creation of all men by a Common Creator is taken as the prime axiom of all law and political science. The fundamental duties, imposed by divine command on

each man, to his Creator, to himself, and to his neighbor evidently necessitate that he should have those rights against all other men and all bodies of men, which are needful to enable him to fulfill these duties. Such rights are of an extraordinary character. They arise not by the gift of any man, but by "endowment" of "the Creator." These rights not having arisen from gift of any man, cannot be given away by any man. They are "unalienable." The rights which are needful to enable each man to perform the duties imposed by the Commandments are not completely specified in the Declaration, but it asserts that "among them" are the right of "life," the right of "liberty," and the right of "pursuit of happiness."

The right of property is regarded as a right which is not fundamental, but as one which is incidental to and limited by these fundamental rights. Governments, however instituted, are declared to be bodies of men who derive their just powers from the consent of the governed. These words are taken from the formulas of the Roman law of agency and signify that the relations of governments to the governed is analogous to that of agency in the private law. It is not said how governments are to be instituted, the statement being simply that "governments are instituted among men." The fundamental right of all governments is declared to be that of agents of the governed to "secure" the fundamental rights of all men by all reasonable and needful means and measures. These rights being unalienable, governments can, in the interests of the general security of these rights, deprive any man of them only for willful violation of the equal rights of others, by a due process established by a law consistent with the fundamental law and previously made by consent of the governed.

The American constitutions are logical applications of the fundamental law as declared in the Declaration of Independence. The State is regarded not as the source of all law, but as being itself subject to the fundamental law and as a human institution or agency to secure human rights under this law. Governments, being bodies politic and corporate and agents of the governed, properly act under written powers of attorney given by consent of the people governed, delegating plenary powers of agency to secure the fundamental rights of men, and duly limited and safeguarded in such way as to secure the faithful and efficient performance of the agency.

By reason of the universality of this fundamental law, which Americans hold as the American Idea, the powers of all States and all governments are necessarily limited in all their relations, including their relations to other States and governments. For the protection of the fundamental rights of men, independent States and governments may wage war with other States. To assure the observance of the fundamental rights of their citizens within the jurisdiction of other States, or on the high seas, which are of common jurisdiction to all States, they may enter into treaties with other States. To extend the area within which these fundamental rights are secured, they may properly enter into unions with foreign States, of such kinds and on such terms as will enable them all more perfectly to secure the fundamental rights of all men and to extend the area within which these rights are in fact secured.

Unions of States may, according to the American Idea, be equal unions, in which the States united are in the relation of equal associates, partners or cotenants; or they may be unequal unions, in which some of the members are in temporary subordination to one or all of the other members.

The Declaration, as has been said, does not require that governments should be instituted by the governed, since it states simply that "governments are instituted among men"; and hence a State which itself observes the fundamental law and the people of which have instituted a government by consent may institute a government for peoples which have not yet attained to the capacity of consent or to a knowledge of the fundamental law, and may unite these peoples to itself as States in unequal, subordinate, and tutorial union.

Thus, according to the American Idea, a union of States may be effected in three ways: By two or more States which recognize the fundamental law and secure fundamental rights, mutually entering into an agreement to constitute a new union, as equal parties and cotenants; by such an existing union and such a State not of the union mutually agreeing that the State shall be admitted to the union as an equal partner and cotenant under the constitution of the union; and by such a union or State uniting to itself as a State in unequal, subordinate, and tutorial union a people which has not yet attained to the capacity of consent or to knowledge of the fundamental law, for the purpose of educating them up to the capacity for consent and to the knowledge of the fundamental law, in order ultimately to set them up when fully educated, as an independent State, capable of joining them in equal union.

For any State the act of entering into a union with foreign States is of momentous importance. Any kind of union of States involves each State in an intimate, confidential, and more or less permanent and obligatory relationship with other States of diverse principles and standards. Such a relationship is particularly difficult and dangerous for those States which have set up for themselves the higher or the highest standards. The

American Idea is the highest standard possible. There is great danger, since the United States is at present the sole custodian and guardian of the American Idea, that in a political union the American Idea might be submerged and lost. The more intimate, confidential, obligatory, and permanent the relationship is, the greater is the danger to the American Idea. Nevertheless, the present situation of the world requires that there should be union of States to the greatest extent practicable, and the United States must face the situation and fulfill its duty in this respect.

In a general way, it may be said that a League of Nations—that is, a general union of independent States on equal terms—according to the American Idea would be one which would constitute a relationship between them of as intimate, confidential, obligatory, and permanent a character as is consistent with each protecting itself and being protected in its right to determine its own action in all cases according to its own ideas, provided these ideas are in conformity with the universal and fundamental law. A union of States, to be safe, according to the American Idea, would have to be under a written constitution containing delegations of power to appropriate common organs, and providing limitations and safeguards upon the exercise of the power. Moreover, to assure adequate protection of each State in a union against usurpation of power by the union, the constitution of each of the States of the union would have to contain provisions adapting the government of the States to any possible relationship of union with other States.

Before it will be possible to have any general obligatory union of States, therefore, the political scientists and lawyers of the various States will have to do a great amount of work. First of all, the power of treaty will

have to be differentiated from the power of union. They are, in fact, two different and distinct powers, having a scope and purpose different from each other and governed, therefore, by different principles. The power of treaty should be confined to making agreements other than those constituting a personal and confidential relationship between States; the power of union to making agreements and constitutional arrangements for entering into personal and confidential relations with other States. Each State will have to differentiate in its own constitution the powers of union from the power of treaty and carefully safeguard the exercise of both powers; for under guise of exercising the treaty power it is possible to precipitate the State into union.

At present there are no sufficient constitutional checks in the constitution of any State to prevent executives from entering into secret treaties, secret concerts, secret alliances, and secret unions. There is no consensus of opinion among political scientists concerning the proper organs of the State to exercise the power of treaty or the power of union. Evidently the most august body in each State—its legislative assembly—is the proper body to be intrusted by all States with the power of union. No consensus of opinion exists concerning the procedure to be observed in entering into union. Evidently the solemnity of the act requires in each State that the act be done under the most deliberate and solemn procedure. No consideration has yet been given by any State to the new constitutional organs and processes which have become necessary, now that the living of States in constitutional union has become a practical necessity and all foreign relations are taking on a domestic character.

The Constitution of the United States is as defective in this respect as that of any other State. When it was

formed, the people of the United States had just succeeded in withdrawing by revolution from a political union which was not according to the American Idea, and they were interested in establishing their own States and their own union according to the American Idea. They had no occasion to consider the proper manner of projecting their own States and their own union into a greater union. Their experience had made them realize the danger of entering into personal and confidential relationship with foreign States, all of whom either derided or parodied the American Idea. It was evidently thought best not to suggest the possibility of union with foreign States, and to leave the matter to be settled in the future, when the occasion should arise.

The situation of the world has not changed since the days of the Constitution. The political science, the law of nations, and the general constitutional law of the world are as yet as crude and undeveloped, as respects the power of treaty and the power of union, as they were at that time. The ruling classes still deride the American Idea or parody it in terms of the French Declaration of the Rights of Man. Now, as then, all States which are honestly intentioned, and the United States in particular, will avoid all projects of unions containing provisions obligating the member States to act otherwise than according to their judgments and consciences. A union on any terms less liberal than these would change the constitution of every State which entered into it and would require to be entered into by the process of constitutional amendment.

The so-called Covenant of the League of Nations contains several provisions which are likely to result in infringement upon the powers of each member State to act according to its reason and conscience, and some which actually do infringe upon those powers. The

plan of the League seems to be a composite. In part it seems to be taken from the plan of the "Covenanted Leagues" of individuals, which prevailed openly and secretly in Europe some centuries ago, whereby the members bound themselves by oath to each other and to the ruling council to maintain and propagate a religious faith and a form of political organization, with the object of placing civil government under ecclesiastical control. In part it seems to be drawn from that applied by Spain and England in the sixteenth and seventeenth centuries, whereby the king in his privy council and in his shadowy and inefficient great council, in correspondence with the ducal or provincial councils, ruled the people of the kingdom absolutely. The covenanted leagues produced their own councils of inquisition, absolutely ruling the members of the league by terror of their oaths. The conciliary system of Spain and England produced the High Court of the Inquisition, and the High Court of the Star Chamber, with their processes of secret sentence, excommunication, anathema, and assassination, in contempt of the fundamental law and the fundamental rights of men.

The obligations under the Covenant of the League of Nations are opposed to the American Idea in at least the following respects:

First. The Council and the Assembly are said to have the function of "advising" the member States; but in giving this advice they are not required to observe the fundamental law or any principles whatever. The member States "covenant" to follow the "advice." "Advice" given by one person to another who is obligated on oath to follow the so-called "advice" is command, not advice. When no principles are laid down as obligatory on the adviser, and the person advised binds himself to follow the advice, the power of so-

called "advice" is the power of absolute command, in disregard of the fundamental law.

Second. The Covenant defines aggression and wrong-doing in terms of warlike action, whereas the only aggression recognized by the fundamental law is that which occurs when States or governments deprive pe sons of their fundamental rights without due process of law. Such aggression, and such only, is an aggression against all other States. Each State may properly protect itself against such an aggressor State, by war if necessary; and all States are in duty bound, under the fundamental law, to correct by their joint influences and strength such an aggressor State. To regard a State which makes war on such an aggressor State as the real aggressor is to render the League an agency of perversion and injustice.

Third. The Covenant places the power to direct the activities of right-doing States and to correct the activities of wrong-doing States in the same body of men—an arrangement which in fact makes this body of men at once a legislature, a court, and an executive. Such a combination of functions in one person or body invariably results in absolute government. The fact that the League provides for a Council and Assembly is of no consequence, since in each of them the two functions are similarly confused.

Assuming, therefore, that the proposed "League of Nations" is impossible according to the American Idea, the question arises: What kind of a league of nations, or general union of States, is now possible, as a matter of practical politics, according to this idea? It seems clear that the only such league is a general union of States for mutual counsel, in which the member States assume no political obligations and in which each is free to act according to its reason and conscience. That this

is possible and practicable is shown by the fact that the United States is a member of two such unions. One of them is the Union of the American Republics, whose organ is the Pan-American Union, located in Washington. The other is the general union of States, as yet unnamed, commonly called the Hague Union. This union is in fact, though not in law, constituted by the Convention for the Peaceful Settlement of International Disputes, formulated by the Hague conferences. Its organs, located at The Hague, are the Permanent Court of Arbitration, the Permanent Administrative Council, and the International Bureau.

The union of the American Republics was initiated by the Congress of the United States in 1888, after the idea had been incubated for sixty years. By act of Congress delegates of the American States were invited to assemble at Washington, on a date fixed, as guests of the United States. The object of the Conference, as originally projected, was "to consider such questions and recommend such measures as shall be to the mutual interest and common welfare of the American States." The Congress limited it to discussion of arbitration and improvement of commercial relations. The invitation included a program of subjects to be discussed, but the first was "measures that shall tend to preserve the peace and promote the prosperity of the American States." Thus a way was provided for considering at any conference any matter deemed desirable for discussion by the majority.

The Pan-American Union is a committee of continuation of the conferences. The conferences, with their bureau of continuation, constitute the union. A written constitution formed by the conferences has been drafted, but not adopted. The Hague Union is formed in substantially the same way. The President accepted

the invitation to participate in the conferences. The Convention for the Pacific Settlement of International Disputes does not purport to be a written constitution of the Union, although it institutes the common organs. The lack of a continuation committee and the absence of a corporate name render the union imperfect. The program of The Hague Conferences has been limited to the subject of the settlement of international disputes. Because of this unnecessary and undesirable restriction, The Hague Union has accomplished little. The Union of the American Republics, with its more liberal program, has accomplished much for the general welfare of the States concerned. Neither of these political unions involves any political obligations on the part of any member State. The object of both unions is to reach an agreement of opinion, sentiment, and purpose on certain subjects of mutual interest, and to embody the agreements in formal resolutions or in international conventions, leaving the member States free to act according to their own consciences and judgments.

A League of Nations, according to the American Idea, would undoubtedly be one modeled on the plan of the Union of American Republics. It would have for its object to hold periodical conferences "to consider such questions and recommend such measures as shall be to the mutual interest and common welfare" of all the States and unorganized or partly organized peoples. It would have as its organ a continuation committee of common consultation and counsel, to collect information, to make recommendations, and to adjust the program of each conference. Each conference would, however, be free to consider whatever measures the majority should deem needful "to preserve the peace and promote the prosperity" of all the States and peoples concerned. Under such a union no po-

litical obligation would be assumed. Each State would hold to its own idea, and in the competition of ideas the American Idea, by reason of its sound basis and its success as applied in the United States in bringing about peace and prosperity, would tend to prevail.

By such a league of mutual counsel, under the lead of the United States, a new part of the law of nations, according to the American Idea, would gradually be evolved, based on the analogies drawn from the part of the private law which is concerned with the personal and confidential relations of men—the law of agency and trust, of copartnership, of cotenancy, of patron and apprentice, of guardian and ward. As the law was evolved, the relation of the States to each other and the relations of all States to the peoples not yet of full political capacity would tend to have less of a foreign and more of a domestic character, and the States would gradually provide themselves with organs of mutual correspondence with the union and with each of the other States, adapted to the new, difficult, and delicate, but highly desirable, relationship.

When such a law of nations has been evolved and accepted, defining the social rights and duties of States; when such institutions of mutual correspondence shall have been established; when all the States have adopted written constitutions according to the American Idea, in which suitable and scientific provisions concerning the power of treaty and the power of union are inserted, a League of Nations in which each State would obligate itself to observe the law of nations might be possible. Such a league, though likely to be formed only in the distant future, would be according to the American Idea. When a formal constitution of such a league shall be drafted by a constitutional convention of all

States, the United States may enter it without amending its Constitution; for the law of nations, based on the American Idea, is a part of the Constitution of the United States.

THE POSITION OF THE JUDICIARY IN THE UNITED STATES

THE POSITION OF THE JUDICIARY IN THE UNITED STATES

Reprinted from The Annals of the American Academy of Political and Social Science, September, 1912. The Initiative, Referendum and Recall

AT the present time two circumstances are directing public attention to the position which the judiciary holds in the American political system. The initiative, the referendum and the recall are extending widely, and the prospect is that they will soon become prevalent throughout our states. It is clear that if these methods of controlling governmental action by popular vote should be carried sufficiently far, they might be used so as to extinguish the power which our courts have to treat as void any governmental action which is in excess of the powers granted by our written constitutions. At the same time that the position of our judiciary is thus endangered by the coming of these new forms of political action, its position has been seriously weakened, in the eyes of many of our best citizens, by its own action in exercising its power to hold laws unconstitutional. It is probably true that some of our courts have exercised this power in a retrogressive manner; that is, in such a way as to interfere with the people in their proper development and progress, and with the nation in its fair competition with foreign nations. Thus the position of our judiciary in our political system is at the same time endangered from without and from within. If it be true that our

courts are proving themselves unable properly to perform the high and extraordinary functions which we have laid upon them, those who advocate the extension of the initiative, the referendum and the recall are entitled to be heard with attention. If our system is sound, and is merely operating badly for the moment on account of some specific defect or ambiguity in our constitutions, or because we are passing through some temporary social or economic phase or condition, or because of the too great rigidity of the legal mind as now trained, the initiative, the referendum and the recall as remedies for the difficulty must be considered along with other possible remedies. If it be true that our system has broken down by reason of the inability of our courts to bear the burden placed on them, the next most feasible plan is that of "responsible government" under an unwritten constitution, as it exists in other countries, and to this the initiative, the referendum and recall, if applied in a wide sense, seem necessarily to lead.

It therefore becomes necessary to examine the philosophical and legal basis on which our system rests, and to make up our minds whether our system is reasonable and practicable and as good as or better than any other. If we conclude that it is, and that therefore the functions which we have given our courts are reasonable and capable of being properly performed by them under all ordinary circumstances, it will be necessary to attempt to discover the reason why some of them have happened to make the decisions which are regarded as retrogressive. If we succeed in discovering these reasons, it will particularly be necessary to consider how far the initiative, the referendum and the recall can be used, if they can be used at all, as a means of remedying any aberrations of our courts in performing their superintending and nullifying functions.

An attempt will first be made, therefore, to state the philosophical and legal basis on which our system rests. The simplest way seems to be to state the propositions of politics and law which underlie our system, beginning with the most fundamental and proceeding by successive steps to the various derivative propositions, illustrating each, so far as space will permit, by reference to historical facts.

The fundamental proposition upon which our system rests, as it would appear, is, that governments are the agents of the governed. There are, as history, experience, and philosophy show, in the last analysis, only three forms of government—the patriarchal form, the agency form, and the imperial form. In the patriarchal form governmental power is conceived of as derived from a source external to the people governed, that is, from God, and is devolved from above downward upon subordinate officers and subjects. In the agency form, governmental power is conceived of as derived from the people governed, who delegate limited powers to officers who are neither above nor below the people, but are on an equality with the people as contracting parties and agents. In the imperial form, all power is conceived of as derived from the people governed, who are assumed to have conveyed all their powers to a ruler or government, so that the ruler or government thus has a power equally absolute with that of a patriarch and devolves his or its power from above downwards upon subordinate officers and subjects.

When, therefore, it is said that our system depends upon our acceptance of the proposition that governments are the agents of the governed, it is the same as saying we have chosen to adopt the agency system of government and have not allowed ourselves to be subjected to the patriarchal system or to the imperial system.

It becomes important, therefore, to inquire what is necessarily involved in the acceptance of this fundamental proposition—that is, to inquire what are the fundamental principles of agency. About this there is no difficulty. Agency is one of the most common and necessary of human relations. The fundamental principles of agency have been settled for at least fourteen centuries. These principles were summed up in the civil law by two maxims. The first of these was, *Obligatio mandati consensu contrahentium consistit;* a translation of which is, "The powers of an agent are derived from the consent (or agreement) of the contracting parties." The second was, *Rei turpis nullum mandatum est;* a translation of which is, "There can be no agency to do an unjust (or wrongful) act." The meaning of these two maxims is, that the agent has no powers except those delegated to him by the principal and accepted by the agent in the agreement of agency made between them, and that any acts done by the agent in excess of these powers are void as to the principal; that even if the agent acts within the powers thus delegated to and accepted by him and agreed to by both parties, yet if in so acting he does an unjust or wrongful act to any one,—as distinguished from an act of negligence,—the wrongful act is in excess of his powers, and is void as to the principal; and that even if the principal and the agent agree that the agent shall have power to do wrong or injustice, the agreement is void as a contract of agency and operates only to make the principal a wrong-doer jointly with the agent, in case the agent does the wrong or injustice. When we say, therefore, that our political system is based on the agency theory, we mean that our governments have no powers except those which are delegated to them by the people and accepted by the governments by acceptance

of office, and which are agreed to between the peoples and the governments; that even if our governments act strictly within the letter of the powers granted, they have no power in exercising those powers to do injustice to any one; and that if the people should attempt to delegate to any of our governments a power to do injustice, the attempted delegation of power would be void, and the governments would have no power to do injustice.

The first great public document in which this theory was foreshadowed was Magna Charta. This great charter, granted by King John to the Barons in 1215, was made, however, under such circumstances and was couched in such language that it required interpretation. In subsequent confirmatory charters granted by the English kings to the people by act of parliament, these principles gradually became more clearly stated. The Reformation, by emphasizing the importance of the individual and his direct relationship to God, gave a wide extension to the idea that all institutions, including the institutions of government and church, are for the benefit of the individual; and it was a natural and necessary conclusion that all the persons concerned in the management of institutions and the institutions themselves were agents of those for whose benefit they existed. The people of Continental Europe, however, long accustomed to regard themselves as members of clans or armies, and to regard the head of their nation as invested with patriarchal or imperial power, were not able to apply this theory successfully against the opposition of those attached by conviction or interest to the patriarchal or imperial theory.

The principle that governments are the agents of the governed was recognized in the charter granted by the king in council to the Massachusetts Bay Colony in

1629. By that charter it was provided that the freemen of the colony should meet in general court every three months, and that at one of these courts, called the court of election, all the officers of the colony should be elected. In the Massachusetts Body of Liberties of 1641, this system was established by statutory provision, and it was also arranged that officials might be recalled for cause at any of the general courts other than the court of election by majority vote upon cause shown.

The same right of the citizens of the colonies to elect all their own officers was recognized in the Rhode Island charters of 1643 and 1663, and in the Connecticut charter of 1662. The colonies regarded these charters as the ones which really expressed the full extent of their political rights, though other colonial charters provided for appointment of the governor, and in some cases the governor and upper house, by the King of Great Britain in council.

The Continental Congress was from the outset a congress of agents of the colonies. When that congress adopted the Declaration of Independence, it committed the United States for all time to the agency theory. It was declared that governments are instituted among men for the benefit of the individual and primarily to protect and preserve each individual in the reasonable exercise of those attributes of life, motion, and prehension which are common to all human beings and which are essential to the existence of every human being. It was declared that each individual has a divine right, by reason of the fact that all are equally created by God with these attributes, to life, liberty (motion) and the pursuit of happiness (prehension). "To secure these (divine) rights" of the individual, the Declaration asserts, "governments are instituted among men," evidently meaning either by their consent or by

external force. However governments may be instituted, whether by consent or force, the Declaration declares, they are the agents of the governed. The words are: "That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." This clearly means that governments have no power to do any unjust acts, and that all their powers to do just acts are derived from the agreement of agency between the government and the governed. The expression "deriving their just powers from the consent of the governed" seems clearly to be a combination of the two maxims of the law of agency above quoted, that the powers of an agent are derived from the consent (or agreement) of the contracting parties, and that there can be no agency to do an act which is unjust or wrongful to anyone.

The second proposition on which, as it would appear, our system is based, and which is a derivative from the first, is, that states are corporations. If governments are the agents of the governed, the whole organization consisting of the government and the governed permanently operating together as one mechanism or body, is an artificial person or corporation. The people governed are in this view the members of the corporation, and the government the officers and board of directors of the corporation.

The principles of the law of corporations are those of the law of agency. The corporation, regarded as an artificial and legal person, is the agent of its members. Its powers are those which are agreed to between it and the members; the members delegate specific powers to the corporation, and the corporation accepts them. The corporation has no powers except those delegated by the members, and even if it acts within the letter of those powers it has no power to do an act which is un-

just or wrongful to any one. Any act of a corporation in excess of its powers is void. Even if the incorporators or the state should attempt to give the corporation power to do injustice to any one, such attempted delegation would be void, and the corporation would have no power to do injustice.

Prior to the Reformation the conception of a number of persons united for a common purpose under a governing body of agents selected by them, as an artificial person which was itself the agent of the members of the corporation, though not unknown, was little understood or applied. Religious, charitable and educational corporations existed, but cities, towns and trade-guilds furnished the principal examples of political or industrial corporations. So far as there was anything corresponding to the modern territorial state, it was not conceived of as a corporation, but as a family or clan. The city-states and small republics of Europe, however, to some extent recognized themselves as corporations. The possibility of regarding territorial communities as corporations was also made manifest when the republics of Venice and Genoa, in the fourteenth and fifteenth centuries, chartered corporations for trading and banking purposes with powers of government over the colonies of merchants on the shores of the Black and Ægean seas. This practice was soon followed by France, Holland and England. It only needed that the colony should grow strong enough to control the corporation for the colony to consider itself as the corporation and to elect its own officers. The idea of a "commonwealth," or a corporation on a fixed territory having for its purpose the common weal of the persons there residing and inhabiting, was the logical result of the social, economic, political and religious ideas and theories which the Reformation brought forth. Grant-

ing that the development of the individual is the important thing to be considered both in theology and politics, and that all institutions are for this purpose, it follows that it is not only the right but the duty of each individual to assist in molding the institutions which are for his benefit. By conceiving of a group of persons united for a common purpose as a personality outside of and distinct from them all, and as the agent of all, the institution was brought under the control of the group, the artificial personality being the agent of the group.

At the time the colonization of New England began in 1621, the corporation theory of the state was just beginning to take strong root in England. This theory was opposed by the ruling classes as a whole, though some of the nobility and a great part of the well-to-do farmers and professional men believed in it. Those who emigrated from England to America at this time did so because they believed that governments are and of right ought to be the agents of the governed, and that states are and of right ought to be corporations. In the "Mayflower Compact" of 1621, entered into between the members of the colony which afterwards settled in Plymouth, Massachusetts, the colonists "covenanted and combined" themselves into "a civil body politic" for their "better ordering and preservation." The charter of the Massachusetts Bay Colony of 1629 provided that the persons named and their associates should be a "body corporate and politic." The people of Connecticut by their "Fundamental Orders" in 1638 "associated and conjoined" themselves as a "public state and commonwealth." In 1641, the Commissioners to Regulate the Colonies appointed by the Lords and Commons after Charles I had refused to act with them on account of their insistence on the agency theory of

government, granted to Roger Williams and his associates at Providence Plantations "a free charter of civil incorporation and government" by which the colony was given the name of "The Incorporation of Providence Plantations." The charter of Connecticut of 1662 declared that the persons named and their associates should constitute "one body incorporate and politic," and the same language was used in the Rhode Island charter of 1663. In all these charters provision was made for election of all the officials by the members of the corporation, and these colonies were treated by the English government as English corporations. This, however, the colonies contested. They claimed that they were American corporations, and states, created by the voluntary act of the members, and that the charters granted by the English government were mere authentications or approvals of the voluntary union of the colonists. In this they were in accord with the trend of modern thought. More and more it is beginning to be realized that corporations are created by the act of the members and not by the act of the state, and that when the state "grants" a charter of incorporation its act is in legal effect merely an act of authentication and approval for reasons of convenience, and not in a true and real sense of grant of corporate powers. It is on account of the realization of this fact that progressive states now allow corporations to organize themselves under general laws.

After the colonies became independent, the idea that they were at once states and corporations was universally accepted and acted upon.

The third proposition on which the American system, as it would appear, is based is, that corporations may be formed of corporations. This proposition is now a familiar one to us in the industrial and social as well

as in the political world. As a corporation is a legal person, there is no reason why it cannot be a member of a corporation. The idea that a corporation may with other corporations, or even with other natural persons, form a corporation, is now so familiar to us as to be a commonplace. The modern "trusts" for industrial purposes and the modern "federations" of trades unions or other corporations for social purposes, are made up of corporations as members. A holding or "trustee" or "federating" corporation is created by the combining corporations which is given federal powers for the common purposes. The whole organization constitutes a corporation composed of corporations.

The conception of a corporation composed of corporations which should also be a state, was first worked out or at least foreshadowed by an arrangement between the colonies of Massachusetts Bay, Plymouth, Connecticut and New Haven, made in 1643, when England was paralyzed by civil war and the colonies, surrounded by enemies, were thrown on their own resources. These four colonies entered into a "Consociation" or "Confederation," declaring that they did so "for mutual help in our common concerns, that as in nation and religion so in other respects we be and continue one." The new federal corporation, by the name of "The United Colonies of New England," was governed by a board of eight commissioners, two from each colony; the board having power, by a three-fourths vote, to bind the whole federal corporation and state for certain specified purposes. This corporation composed of corporations continued in existence and operation for over thirty years, dealing with the common interstate concerns of these four colonies and with their foreign interests, without much interference from England.

From 1690 forward various schemes were proposed

for federating the American colonies so as to form one federal corporation or state either under Great Britain or in federation with that state. Among others, William Penn in 1697 formulated a very definite and complete plan. None of the plans for this purpose, however, was acceptable, but an arrangement was devised which, as it evolved, resulted in uniting the colonies and Great Britain into one corporation or state, which the colonies regarded as a corporation composed of corporations, to which the name "the British Empire" became attached. From 1696 until 1765, there existed in England a governing tribunal for the common purposes of Great Britain and the colonies which was made up of members of the King's Privy Council. This tribunal was called "the Committee of the Privy Council for Plantation Affairs" and was assisted by a subordinate body called "the Commissioners for Trade and Plantations." The whole British Empire, composed of Great Britain and the colonies was, as matter of fact, in cases arising before the tribunal, treated as if it were a corporation composed of corporations and as if it were a federal state composed of states; the state of Great Britain being in fact treated as the ruling state for the common purposes.

The fourth proposition on which the American system is based, it would seem, is, that to the convenient and orderly existence and operation of corporations, and of states which recognize themselves as corporations, written charters or constitutions are necessary. This is because limitations of power can be made effective only as they are carefully formulated in writing and published so as to be known to all concerned. As corporations are by their definition artificial persons and agents with limited powers, and as their officers are agents oftentimes linked together in a complex series of opera-

tions where there is a great division of labor, it is essential to their orderly and convenient management that these limitations of power should be formulated in written constitutions. The more complicated the corporation the more necessary the written formulation of the limitation of powers. Hence a written constitution is even more necessary to a federal state, which is composed of states, than to a compact state.

The discussion that was carried on prior to the American Revolution concerning the limitations of the powers of Great Britain and the colonies as constituent elements of the great state and corporation called "the British Empire," called attention to the necessity of written constitutions. It had long been recognized that corporations for industrial or social purposes could not conveniently exist except under written charters. Cities and towns also had discovered the necessity of having written charters. All the American colonies except Virginia and New York were organized under charters recognizing more or less completely their corporate character, and the colonies had thus learned to appreciate the convenience of having their fundamental law contained in one document. The study of the relations between Great Britain and the colonies brought out the fact that the complex corporate and political unity called "the British Empire" was under a constitution of its own quite different from that of Great Britain. It also brought out the fact that there was a great difference of opinion as to what the provisions of the constitution of the British Empire were or ought to be. All Americans agreed that the empire was an aggregation of states under the headship of Great Britain, and that the powers of each of the constituent states were limited in such a manner that the whole British Empire could hold together and operate for the

common good. It was pointed out by writers on both sides of the water that so large and complex an organization of states ought to exist under a plan of organization carefully formulated and written down in one document, so as exactly to express the limitations of the various agencies composing the government. The first act of the Continental Congress after deciding upon a declaration of independence, was to set about making a written constitution for the union of the colonies as states and corporations. All the colonies except Connecticut and Rhode Island, in accordance with the suggestion of the Continental Congress, adopted new written constitutions. Connecticut and Rhode Island, having power under their colonial charters to elect all their own officers, adopted their colonial charters as their state constitutions, and lived under them for many years after they became states.

The fifth proposition on which the American system is based is, as it would seem, that in order to keep the various agencies in a corporation working within their proper spheres and in harmony with each other, there must be somewhere in the organization a superintending agency with power to nullify the action of all other agencies which is in excess of the powers which these agents ought properly to exercise. Where a corporation is composed of corporations and the constituent corporations are thus at the same time agencies of government and members of the larger corporation, the necessity of having some superintending and nullifying power to secure the proper working of the complicated mechanism becomes still more evident.

In the prevailing thought of the Americans, the king in council was the agency in the British Empire in which this superintending and nullifying power was lodged. The majority of the Americans regarded the

Lords and Commons of Great Britain as the local legislature of Great Britain, and insisted that it was the duty of the king advised by his privy council, as an arbitral and judicial tribunal, to use his veto power as a nullifying power for the purpose of nullifying even acts of parliament which this tribunal should find to be in excess of the powers which Great Britain ought properly to have exercised as a constituent state and a governmental agent of the British Empire. It was because they considered that George III had failed and refused to exercise this superintending and nullifying power, as the superintending and nullifying agency of the whole empire, and had united with his ministers and the lords and commons in attempting to assume patriarchal or imperial power in the federal state called "the British Empire," that he was held responsible in the Declaration of Independence for the disintegration of this federal state.

The sixth proposition on which, as it would appear, the American system is based, is, that the superintending and nullifying power is an agency of a judicial, and not of a legislative or executive nature; and that therefore, although it is an extraordinary kind of judicial power, it may more safely be committed to the judiciary than to the executive or the legislative or to an extraordinary agency outside of the legislative, the executive and the judiciary. Such an extraordinary agency might easily pervert a superintending and nullifying agency so that it would become in fact a patriarchal or imperial power.

In the first written federal constitutions adopted by the American Union, it was sought to avoid the necessity of a superintending and nullifying tribunal by establishing between the colonies merely a permanent alliance or confederation advised by a Congress of

ambassadors. The Declaration of Independence was itself in part a written constitution of union of the American states, for in it they described themselves as "The United States of America"; but as it contained no specification of the powers which the union, as distinct from the states, should exercise, it created only a permanent alliance or confederation. The articles of confederation specified the powers of the union; the powers granted to congress being those which before the Revolution the king in council had exercised over the colonies as the federal head of "the British Empire" with their consent. These articles made no provision for any superintending and nullifying agency. They, however, denied to the union any power to lay or collect taxes, or to regulate interstate or foreign commerce, or to acquire or govern colonies. As these were the powers respecting the exercise of which in the empire Great Britain had made excessive claims of power, and out of which the dispute between Great Britain and the colonies had arisen, it seems to have been hoped that, by withdrawing these powers altogether from congress, disputes regarding the limits of powers would be avoided, and thus no superintendence or nullification would be required.

The Constitution of the United States, adopted in 1787, conferred these three disputed powers on the union and provided a method for nullifying acts done in excess of power by the union or by the states. This nullifying power as respects the limitations placed upon governments and states by that constitution, was vested in the Supreme Court of the United States in the last instance, though permitted to be exercised by all the courts subject to the final decision of the supreme court. It was thus recognized as a judicial power, though of an extraordinary kind. This was logical; for the question

whether an agent, a governmental officer, a corporation or a state has exceeded his or its powers, can best be decided by the hearing and examination of evidence and the application of legal principles.

The seventh proposition on which the American system, as it would seem, is based, is that in order to enable the judiciary to exercise its superintending and nullifying agency to prevent excess of powers of the other agencies of government, it is necessary that the constitution of the federal state should be made the supreme law of the federal state, and that the constitution of each state should, subject to this supreme law, be the supreme law of the state. By such an arrangement, this extraordinary power of the courts is exercised as a part of their ordinary judicial functions in hearing and adjudicating cases between ordinary parties litigant, and there is little possibility that power exercised in this non-spectacular manner will ever be given any spectacular setting so as to lead to the popular belief that the depositaries of this power are really exercising a patriarchal or an imperial power. The citizen, observing the courts laboriously investigating facts and basing their decisions upon subtle distinctions of law drawn from experience and reason, is not likely to regard the courts as patriarchs or emperors. The safety and permanence of the whole agency system of government in states may, indeed, be said to depend upon the acceptance by the people of the proposition that the limitations of the powers of their governmental agencies are under a supreme law established by the people and interpreted like other law by the courts. Only through the prevalence and acceptance of this idea can there be assurance at all times against the recrudescence of patriarchal or imperial power.

The courts in the United States were, by the consti-

tution of 1787, given jurisdiction to superintend and nullify all action of any of the governments limited by the Constitution of the United States by means of a provision which made the constitution, and the acts of congress in conformity with the constitution, "the supreme law of the land." Under this provision the constitution is applied by the courts, with final appeal to the supreme court, in the same manner as other law, except that it is treated as supreme so that any governmental action inconsistent with its provisions is void. In the same manner, the constitution of each state is its supreme law, subject to the Constitution of the United States which as to the limitations upon governmental power contained in it is supreme over all law throughout the United States.

Enough has been said, it is hoped, to have satisfied the reader that our form of government is based on the propositions that governments are the agents of the governed; that states are corporations; that federal states are corporations composed of corporations; that in all corporations written constitutions are necessary to determine the limitations of the powers of the officers of the corporation and of the corporation itself; that in the case of corporations composed of corporations, written constitutions are still more necessary to fix the limits of the complex agencies; that within every corporation, and especially within every corporation composed of corporations, there must somewhere be vested a superintending and nullifying power and agency, which can promptly and effectively nullify all action done in excess of power, so as to keep the whole mechanism and the whole artificial personality working to its full capacity and effectiveness; that it is safer, as preventing the possibility of the recrudescence of patriarchal or imperial power, to vest this superintending

and nullifying power in the judiciary rather than in the legislative or the executive, or in any extraordinary governmental agency outside of and distinct from the legislative, the executive and the judiciary; and also more logical, since the superintending and nullifying power is judicial in its nature; and that it is necessary, in order that the judiciary should exercise this great power, that our written federal constitution should be the supreme law for federal purposes and our state constitutions supreme law for state purposes.

Our system is therefore just, scientific and practical. It is more just, more scientific and more practical than any other system; for none would now assert that the patriarchal or the imperial theory of government is more just, more scientific and more practical than the agency theory, and all other systems are based on compromises between the agency theory and the patriarchal or imperial theory.

It therefore remains to attempt to discover in what respect our system is at the present time operating badly, and to attempt to suggest a remedy; and particularly to inquire whether the remedy can be had by the use of the initiative, the referendum or the recall.

A constitution of a corporation or of a state must evidently deal with four different subjects:

First. The organic structure of the corporation or state—that is, the relations which the parts of the mechanism bear to each other.

Second. The relations between the governing board of the corporation or the government of the state, and the individuals composing the corporation or state as members of the corporation or citizens.

Third. The relations between the corporation or state and its members or citizens, and those corpora-

tions or states with which it is federally or permanently connected or united, and their members or citizens.

Fourth. The relations between the corporation or state and its members or citizens, and those corporations or states with which it is not federally or permanently connected or united, and which are "foreign" to it, and their members or citizens.

The present defects in the working of our system are not with respect to the relations described in the first, third or fourth specification. There is no complaint of the rulings of our courts in constitutional cases involving the relations between the different parts of our state and federal governments or between the Union and the states as parts of the mechanism of the Union, or involving our relations with our protectorates or dependencies, or with foreign nations, or with the citizens of any of these countries, or between our citizens and any of these countries or their citizens. The present complaint arises exclusively under the second specification. It is charged that our courts have ruled erroneously in constitutional cases involving the relations between the state and its citizens and inhabitants. In nearly all the cases where the courts are alleged to have made these erroneous constitutional decisions, their decisions have been made under constitutional provisions which declare that "no person shall be deprived of his life, liberty or property without due process of law."

On examining the decisions, it will be found that this constitutional provision has been gradually growing in importance in the estimation of the courts, until now it is regarded as furnishing a general test of the constitutionality of governmental action. In so interpreting this provision, it seems that the courts have erred.

By referring to the Petition of Right of 1627, pre-

sented by the lords and commons of England to Charles I, where the expression "due process of law" first occurs in a constitutional document, we shall find that these words are there used exclusively as applied to cases where a man's life, liberty or property is taken away on account of his alleged wrong-doing. The expression occurs in that petition only in the following statement:

"That no man, of what estate or condition that he be, should be put out of his lands or tenements, nor taken nor imprisoned nor put to death, without having been brought to answer by due process of law."

As respects the receipt by the government of the property of good citizens as taxes to be used for the public benefit, the Petition of Right does not use the expression "due process of law," but the word "consent." That provision reads:

"That [the people of England] should have this freedom, that they should not be compelled to contribute to any tax, tallage, aid or other like charge not set by common consent in parliament."

Lord Coke, who is often wrongly quoted as authority for using the "due process of law" provision as a test of the validity of all forms of governmental action, held that quite a different test ought to be applied. In Bonham's Case (8 Coke, 115–118a), decided in the court of common pleas in 1611, while Coke was chief justice, he said, delivering the opinion of the court:

"When an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."

His successor in the chief justiceship, Hobart, in the case of Day *v.* Savadge (Hobart, 87), decided about 1620, said, in delivering the opinion of the court:

"An act of parliament, made against natural equity,

as to make a man judge in his own case, is void in itself; for *jura naturae sunt immutabilia*, and they are *leges legum* (for the laws of nature are immutable, and they are the laws of laws.)"

As late as 1701, Holt, Chief Justice of the Court of King's Bench, in the case of City of London *v.* Wood (12 Modern, 669), approved Lord Coke's statement in Bonham's case.

The American lawyers from the period of the Stamp act onward, led by James Otis, adopted the view of Coke.

John Adams, in his autobiography, gives an account of the drafting of the first resolutions of the Continental Congress by the committee of which he was a member. One question, he tells us, was whether the resolutions should declare the powers of Great Britain over the colonies to be limited by "the British constitution and our American charters," or whether they should "recur to the law of nature" as the basis of their claim to have rights as the governed, against Great Britain as their supreme, but legally limited, government. He says that he was "very strenuous for retaining and insisting on" the law of nature. The resolutions as adopted declared that the limitations of the governmental power of Great Britain as respects the colonies and their inhabitants existed "by the immutable laws of nature, the principles of the English constitution, and the several charters or contracts." It was natural, therefore, that in the Declaration of Independence our ancestors should have based their claim to be absolved from their former political connection with Great Britain, and to be independent states, on "the laws of nature and of nature's God"; and that they should have asserted that governments, however instituted, can only exercise such powers as are just, as agents of the governed. Not to

have inserted this limitation that the powers exercised by government must be "just" would have been to have rendered the Declaration inconsistent with their previous contention, and would have made the framers justly chargeable with bad faith. Having insisted in the controversy with Great Britain upon the universal principle that the powers of all governments are limited to those which are expressly delegated and which are just, it was logically obligatory upon them to adhere to this general principle in the Declaration of Independence and to make this principle applicable to every government and state which should ever be formed by the American people. That they intended to do so, and that they used apt words to do so, there can be no doubt.

The true limitations upon the powers of government in its relations with the governed, when its action is directed to the general welfare as a trustee for all, and not to the punishment or correction of an individual or a class of individuals as a guardian for the weak and deficient, are, it would seem, to be found in the preamble of the Declaration of Independence and in the preamble of the constitution. The Declaration is a federal constitution, since by it was formed the first union of the states. It is at the present time, in so far as it states general principles, our fundamental federal constitution. It has never been rescinded, nor in any way amended. It is not inconsistent with the constitution of 1787. The constitution of 1787 recognizes the permanence of the principles set forth in the Declaration of Independence, and of those set forth in the Articles of Confederation except so far as they are inconsistent with the constitution, by declaring that its purpose is "to form a more perfect union."

In the early constitutions of the states and in the fifth amendment of the Constitution of the United

States, the expression "without due process of law" was used in the same connection as in the Petition of Right—that is, as limiting the power of the government to take away the life, liberty or property of the individual only when the governmental action is directed against an individual for alleged wrong-doing. In this connection the words meant that a person charged in court by another person with wrong-doing, or threatened by governmental action with loss of life or liberty or confiscation of property for alleged wrong committed against the state, could not be held by the government to be civilly liable and could not be penalized criminally except according to a proper procedure established in advance by law and according to principles of law duly formulated. In the fourteenth amendment, however, which was adopted after the Civil War, for the purpose of giving the federal government power to prevent the southern states from reinstituting slavery by indirect means, the provision that no state shall "deprive any person of life, liberty or property without due process of law" was inserted in a connection where it might equally well be understood as covering cases where the state receives the property of honest citizens by way of taxation, or makes general regulations for the public good, and where it is seeking to take away life, liberty or property from persons who are charged with wrong-doing. The courts, under the leadership of the Supreme Court of the United States, have construed this provision as applying to all kinds of governmental action. In so holding it seems that the courts have clearly erred; since the expression "without due process of law," as applied to all kinds of governmental action other than that whereby the government seeks to take away the life, liberty or property of the individual on the ground that he is a wrong-doer, is clearly meaningless.

As the natural result of the attempt by the courts to use the words "without due process of law" as the general test of the validity of all governmental action when these words have no meaning except as applied to one kind of governmental action, our decisions in constitutional cases involving the relations between the government and the individual have become illogical and confused. The attempt to draw a meaning out of an expression which is meaningless because used in a wrong connection must necessarily lead to confusion. As the courts have applied an obscure and unreasonable test in the greater part of the cases involving the relations between the government and the governed, they have naturally fallen into the way of deciding these cases according to the personal or partisan notions of the judges.

The true test, when laws passed in the exercise of the taxing power or the police power are claimed to be unconstitutional on general grounds, is, it would seem, not whether they comply or not with the "due process of law" provision, but whether or not they are "just." In applying this test, the courts will of course not hold an act of the legislature not to be "just," unless it is so clearly "against common right or reason, or repugnant, or impossible to be performed," or "against natural equity" that for the court to uphold it would be to make the court an instrument of injustice instead of a court of justice. Thus in cases of policy, where no moral right or wrong was involved, the legislature would finally determine the rate of social and economic progress; the courts following the legislature.

In the present situation, therefore, when our judiciary is under criticism, it seems that if the fourteenth amendment is agreed to be so worded that it requires the courts, in all cases involving the relations between

the government and the governed, to decide by the test that the state shall not deprive the individual of his life, liberty or property without due process of law, that amendment ought to be amended. It would be sufficient if the words "for alleged wrong-doing" were inserted before the words "of life," so that the phrase would read "nor shall any state deprive any person, on account of alleged wrong-doing, of life, liberty or property, without due process of law." In case of governmental action aimed at individuals or corporations on account of alleged wrong-doing, it would then be the duty of the courts to see that the alleged wrong-doer had a fair hearing and trial under an appropriate process established by law, and according to principles of law duly established.

But perhaps no such amendment is necessary. It may be considered that the fourteenth amendment was not intended to have the broad signification which the courts have attached to it, and that the natural meaning to be given to the words above quoted—especially as the words "deprived of his life, liberty or property" are used, which almost necessarily mean a taking away on account of wrong-doing—is the restricted one according to which the provision in which these words occur is confined to governmental action directed against alleged wrong-doers. If so, the words are ambiguous, and the courts can by their own construction give the amendment its proper meaning.

The provision denying to governments the power to deprive individuals of their life, liberty or property without due process of law is one which occurs in most of the state constitutions, and the state courts have followed the United States Supreme Court in construing it as applying to all forms of governmental action by state governments. If by constitutional amendment or

by construction of the United States Supreme Court the restricted meaning above mentioned is given to this provision, the effect would be to induce the state supreme courts to restrict the meaning of these words in the state constitutions, and the confusion which has been caused by attaching too wide and general a meaning to this constitutional provision should, it would seem, tend to cease.

If the courts should thus by a proper construction of the words "due process of law" be put in the position where they would have to apply specific and easily understood limitations of governmental powers as tests in exercising their superintending and nullifying power, with the addition that they were obliged to nullify any governmental action that was clearly not "just," it is probable that there would not be much dissatisfaction with their constitutional decisions. If the issue was as to the application of a specific and plainly worded constitutional limitation, there would not be room for much personal or partisan reasoning by the judges. If the issue were as to whether a particular governmental action was "just," the court would hold such action unconstitutional only in case it was clearly absurd or impossible, as being opposed to the natural laws of the material universe, or in case it was clearly wrongful as being opposed to the fundamental principles of social justice formulated in the Ten Commandments of the Old Testament and in the Two Commandments of the New Testament. The natural laws of the material universe are necessarily fundamental law; and it is not too much to say that the Great Commandments are now accepted, in theory at least, throughout the society of nations, as fundamental law. Courts in determining whether governmental action was or was not just would in fact be sitting not as state or national courts,

but as courts of the society of nations; for the same principles which would determine whether a certain governmental action was unjust in one nation, would equally control in a similar case in every other nation, and any court in deciding such a case would in a very true sense be applying the constitutional law of the society of nations as the supreme law.

In passing it may be said that this conception of our national courts sitting as courts of the society of nations is not a fanciful suggestion, but is a practical political fact. More and more statesmen and publicists everywhere are realizing and accepting as a fact of practical politics that there is a society of the peoples, states and nations of the world, which for want of a better name we call "the society of nations"; that this society is a corporation composed of corporations and a federal state, having a federal government which is the agent for the common purposes of the peoples, states and nations governed; that this federal government does not consist of a body of definite persons, collected together in one place as the capital, and is not elected on the representative basis, but is made up of nations, states, governmental officers of nations and states, and publicists, scattered over the face of the earth, and is carefully arranged so as to protect the rights of the weaker states and nations and of all minorities; that this inclusive society and federal state has by various legislative methods formulated and is still formulating its own federal constitutional, statutory and customary law, commonly known as "international law"; and that it is daily enforcing its federal law by various executive methods and particularly through the nations and states as its executive organs; and that therefore national courts, in determining what is "just," are not at liberty to consider alone what is regarded as just by

the "common juridical conscience" of their own nation, but must also consider what is regarded as just, and treated as fundamental law, by the "common juridical conscience" of the society of nations.

We may, therefore, it would seem, reasonably hope that by making all our special constitutional limitations clear and distinct and easily understood,—which we shall do by giving the "due process of law" provisions a restricted meaning so that they will apply only where governmental action is directed against individuals as alleged wrong-doers,—and by making the only general test of constitutionality the test of "justice,"—regarding "justice" as that which is considered just by the "common juridical conscience" of the society of nations, —the courts will, as a general rule, act in a manner satisfactory to the enlightened intellect and conscience of the people. But when all precautions are taken it may still happen that the courts, as the superintending and nullifying agencies of our states as corporations, will occasionally err and will themselves exceed their powers and act unconstitutionally. The question arises, what shall be the remedy in such a case.

One remedy which has already been frequently applied, is to amend our constitutions so as to recall the erroneous decisions and validate future governmental action of the kind which the courts have wrongly nullified. But such a process of amending our constitutions is dangerous to our system. Our written constitutions by such amendments are ceasing to be statements of fundamental principles and are becoming confused legislative codes. Thus by this method of attempting to remedy the difficulty our written constitutions are being indirectly destroyed. It is necessary, therefore, to consider other possible remedies.

If we agree that states are corporations, the remedy

to be applied where the courts of a state exceed their powers to superintend and nullify other agencies and nullify wrongly, is the same as would be applied in a corporation if a superintending and nullifying official in a corporation should wrongly exercise his powers of superintendence and should nullify action which he ought to have allowed to stand as valid. The members of the corporation, while indulging in every presumption in favor of the superintending and nullifying official, and relying, as reasonable men ought to do, upon his expert judgment to the fullest extent possible, would, if they were satisfied beyond a reasonable doubt that he had nullified action of an agent which he ought not to have nullified, either remove him by vote of the majority of the members or validate by similar vote the action which he purported to nullify.

This seems to be what is meant by "the recall of judges" and "the recall of decisions," as these expressions are now used by those who believe our courts have erred. The recall of judges is, however, used in two senses which it is necessary to distinguish from each other. There is a recall of judges for incompetence, and a recall of judges for having participated in constitutional decisions by which governmental action has been wrongly nullified. The recall of judges for incompetence, and the recall of judges for participation in constitutional decisions which are erroneous, stand on entirely different grounds. Every state or nation ought to have some orderly method of removing judges for incompetence. Impeachment does not meet such a case, since impeachment is permissible only where moral turpitude can be proved. The best method of removal seems to be by action of the legislature addressed to the executive, though there appears to be no serious objection to a referendum for this purpose if the people prefer

it, and it happens to work well in a given state or nation. The recall of judges for participation in constitutional decisions in which governmental action is erroneously nullified, or the recall of these decisions, must be by referendum, if at all; though the referendum need not actually remove the judges or actually reverse the decision. That the people assembled may exercise this right without necessarily destroying our system is evident. That, in extreme and clear cases, they not only may but ought to exercise in some manner the right to validate governmental action wrongly nullified by the courts is also evident. That this is a dangerous power to be exercised by popular vote is also evident, since it is only in extreme and rare cases that the popular judgment would be likely to be more correct than the expert judgment of the courts. If exercised frequently and if exercised wrongly, it would tend to unsettle our whole system and in the end would probably destroy it. But that a power is dangerous to exercise, is no reason why it should never be exercised. That it is dangerous is a reason for using caution when the power is exercised, and the more dangerous it is the greater ought to be the caution in exercising it.

The recall of judges and the recall of decisions, when used to correct aberrations in the constitutional action of the courts, should undoubtedly be used rarely, and only in extreme cases and as a last resort; and even then with caution and under the most careful safeguards. It should always be remembered that the decision of a court is final only in the case decided, and is never final as settling legal principles; that it is generally the part of wisdom to trust to experts in matters which are complicated and which can be fully mastered only by experts who give their lives to learning the art; that the court as an institution is ever-

lasting; and that though one bench of judges may err, another bench may correct the error, so that the court as an institution is never likely to be wrong except temporarily. Considering the dangers of the recall of judges or the recall of decisions, it seems that it is on the whole safer, in all but the most extreme and rare cases, to trust to the courts correcting their own errors by the pressure of public opinion; never allowing them to forget, however, that they are only the superintending and nullifying agencies of the state as a corporation, and that the people of the state as members of the corporation have the right, which they can and will exercise in the last resort, to annul unconstitutional action of the courts as such superintending and nullifying agencies and to validate the nullifying action, or, at their option, to remove the judges who have thus erred. To grant that the courts in the United States have powers not subject to control by the people in the last resort is to make the courts the American patriarchs or emperors. Like every other governmental agency, our courts, whatever may be the functions they exercise, are the agents of the governed and form a part of the managing boards of the states and of the nation as corporations. Though they have greater functions than the courts of foreign countries, they have a responsibility to the people which prevents the abuse of these great functions. There appears no likelihood that there will ever be such a use of the initiative, the referendum or the recall as will interfere with the performance by our courts of these functions; and there is much in the movement for recall of judges and recall of decisions to encourage the belief that sturdy manhood still persists throughout the American jurisdiction, demanding that governments shall be and remain the agents of the governed.

INTERNATIONAL LEGISLATION AND ADMINISTRATION

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A SURVEY of international politics discloses two great facts. The first is, that the nations have always refused to consider any plan for instituting an international government endowed with physical force. The second is, that the nations, by the Hague Convention for Pacific Settlement of International Disputes, ratified by practically all of them, besides establishing the judicial part of an international organization, legitimized and recommended international conciliation of disputant or belligerent nations by any nation not engaged in the dispute, through good offices and mediation, and also recommended the institution of commissions of inquiry by disputant nations to settle the dispute as agencies of international conciliation.

This second fact is of profound importance; for the Convention for Pacific Settlement is, so far as it goes, a written constitution of the society of nations. By it the united nations instituted an international judicial organ, the Permanent Court of Arbitration; and certain administrative organs ancillary to the court, the Permanent Administrative Council and the International Bureau. By it mediating nations, and commissions of

inquiry instituted by disputant nations, were recognized as international conciliative agencies in the particular case. By it the processes of action of these international agencies and organs were prescribed. By the Draft Convention for a Judicial Arbitration Court —otherwise called the Permanent Court of Arbitral Justice—the Second Hague Conference instituted an additional international organ and prescribed its processes; and when the nations agree concerning the manner of selecting the judges of this new international court and thus put the Draft Convention into effect, the Draft Convention will in fact form an additional part of the Convention for Pacific Settlement. The Convention for Pacific Settlement is, however, an incomplete written constitution, because it fails to institute any international legislative organs or processes whatever, and because the administrative organs instituted by it, being only ancillary to the judicial organ, are inadequate for general international administrative purposes. In spite of the incompleteness and inadequacy of the Convention for Pacific Settlement, however, the fact that it exists, as the substantially unanimous act of all nations, is perhaps the most momentous circumstance in human history. When the substantially unanimous ratification of this convention was completed, in the summer of 1907, the nations ceased to be a mere unorganized community, and became an organized voluntary and co-operative society and union for judicial purposes—a *verband*, as the German writers describe it; or a consociation, as we might call it. (See "Der Staatenverband der Haager Konferenzen," by Professor Walther Schücking of the University of Marburg, published in 1912.)

The nations were not ready, at the time of the Hague Conferences, to consider the question of an improved

arrangement for international legislation and administration. It was not even discussed in 1899 or in 1907. The ten years that have nearly elapsed since the Second Hague Conference have, however, been years of wonderful development and progress. This universal war has clarified many things that before were unseen or seen only darkly. The question of making an improvement in international legislation and administration is now one of practical politics. It is clear that such an improvement must occur through the amendment and revision of the Convention for Pacific Settlement so as to add to it the proper institutions for international legislation and administration, consistent with the existing judicial, administrative and conciliative institutions established by it and conforming to the general spirit of the convention and the fundamental principles on which it is based.

The first question is, ought an international administrative body to be itself empowered to use physical force to control the nations; that is to say, ought a physical-force international government to be instituted by the nations to govern them for the common purposes? If the nations delegate to a physical-force government the power to govern them, they must also delegate to it the power to tax for the common purposes and the power to raise, support, and wield an international army, navy, and police. The power to tax, as has been well said, is the power to destroy.

The question whether a physical-force international government is politically practicable as tending to just government, almost answers itself in the negative; since all the nations have persistently, unanimously, and recently refused even to consider such a form of government. Yet, as such an international government is advocated by many, it will be desirable to analyze the

reasons why it is impracticable, and to satisfy ourselves that these reasons are permanent and unchangeable.

All plans for such an international government fall into one of three classes: They are plans for international government by one nation; or by a league of nations; or by a body of men delegated by the nations, with power to raise, support, and wield an international army, navy, and police. An international government consisting of one nation would be necessarily autocratic, since a nation is necessarily endowed with physical force and cannot be legally limited. The only limitations upon the powers of a nation which are possible are self-limitations imposed by the nation upon itself; which, from the standpoint of political science, are no limitations. Moreover, the only nation which could, as a matter of practical politics, be the constituted international autocrat would be one which was already the *de facto* international autocrat by reason of its control of the seas, the international trade routes, and the regions inhabited by weak or backward peoples, and which was so favorably located as to be able successfully to weaken all its rivals by playing as sure winner in the diplomatic and military game of the balance of power.

A league of nations is, like a nation, endowed with physical force and is incapable of constitutional limitations; and if such a league were to institute itself as the international government, it would have to be, already, collectively, the *de facto* international autocrat. There being no possibility of constitutional limitation as respects either the internal or the external relations of the league, it would necessarily develop an invisible government of its own, which would be the autocrat of the league and of the world. This invisible government would necessarily be a body of men, or the one nation

which at the moment happened to be the *de facto* and actual autocrat of the world.

If the nations, without disarming, were to appoint a body of persons with governmental powers for the common purposes and endow this body with physical force, the result would be to increase the possibilities of war without establishing an efficient international government. If the nations were to disarm and delegate powers of government for the common purposes to a body of persons, at the same time endowing this body with physical force, they would destroy themselves as nations and become states of a universal federal state. Such self-abnegation on the part of the nations, if conceivable as a matter of practical politics, would, however, be of no avail, since a federal state thus established would be found to be inefficient as a means of preserving international order and peace.

The federal state, if attempted to be applied where the requisites for its operation do not exist, establishes an autocracy of a majority necessarily ignorant of its own needs or the needs of the minority, which is the worst and most hopeless of all autocracies. The two requisites for the successful existence of a federal state have been proved to be, first, that it shall include a territory every part of which is contiguous with every other part or is so situated and populated that it may be regarded as appurtenant for political purposes; second, that it shall contain a population which is highly civilized and homogeneous and which is under economic pressure to cooperate as an economic unit. Where these two conditions do not exist, the federated states and peoples are necessarily ignorant of the local conditions of one another and are swayed by their local interests, so that the majority vote of their representatives is necessarily determined by the play of

the local interests against each other. Such a situation means either government by an assembly which is autocratic through ignorance, or an invisible government which is autocratic as being without constitutional limitations. On account of the realization of this danger of the federal-state plan of government, if extended beyond the regions in which the necessary conditions exist, the proposal for converting the British Empire into a federal state, promoted by the Imperial Federation League from 1885 to 1895, was rejected by the people of Great Britain, and by the people of the British dominions, colonies, and dependencies. For the same reason, the people of the United States rejected the proposal to incorporate the Philippines into an enlarged American federal state. Taking the world together, with its diverse nations and peoples, the conditions for uniting the nations and their peoples into a federal state are lacking not only at the present time, but undoubtedly for all time to come.

If, therefore, the nations were to attempt to institute any kind of international government endowed with physical force, they would inevitably be instituting an international autocracy. It would be indispensable that in any constitution of the society of nations, there should be an express constitutional prohibition, denying physical force to any part of the organization—legislative, administrative, or judicial; and also a prohibition denying the power of taxation in any form or under any guise whatever, since a body which can tax can endow itself with physical force.

The object of these prohibitions would be, however, only to prevent the international body delegated by the nations from becoming autocratic, and it would doubtless be needful that the international body should exercise certain international police powers in certain

exceptional cases. Therefore it would be necessary to provide, by way of exception, that these prohibitions should not prevent the nations from making grants to the international body, by special international agreements, of police or taxing power, or both, within international areas or internationalized districts designated by these international agreements, where the local circumstances were such that it would be certain that no resistance would be made to the international police except by individuals or by small unorganized bodies of individuals.

But, though thus substantially deprived of physical force, the international body which any constitution of the society of nations must necessarily institute of course must not be deprived of force, since all government involves the use of force. It could be, and undoubtedly ought to be endowed with persuasive force. Persuasion is a force which is utilizable and every day utilized, with increasing effectiveness, by all governments, but which, like all forces, has the possibility of use for good or for evil. An international body, delegated by the nations, could use persuasion to induce the nations either to cooperate in order and peace, or to compete with one another in disorder and war. By controlling the physical force of some of the nations, it could terrorize and enslave other nations or produce interminable war and anarchy. Such a power must be carefully safeguarded by constitutional limitation, so that it may be effective and yet not dangerous.

The international body, in order to be effective, must exercise scientifically organized, informed, and applied persuasion. This implies conciliation by expert, informed, and aggressive action. The international body must not sit still and wait for the nations to ask it to act. It must investigate and inform itself, must formulate counsel on the facts discovered by investiga-

tion, and must do everything proper to induce the nations to accept and follow its counsel. A body endowed with the power of conciliation uses real force and superior force, for it uses psychical force; and psychical force, being the creator, user, and destroyer of physical force, is necessarily superior and major force.

The international conciliative body, in order to be effective, must be pervasive. It must therefore have in each nation a permanent branch or delegation. Doubtless the international body would appoint the members of each national delegation, subject to confirmation by the nation through its executive government or its legislature. Doubtless also the members of each national delegation would be removable by the international body.

The international conciliative body, in order to be effective, must be armed by the nations with the weapon of publicity, so that it may create and wield, or correct, public sentiment in favor of its righteous counsel. The power to publish its counsel and support it by statement of facts and by argument, might, and probably would, require that it should be granted a means of publication controlled by itself.

The international body, in order not to be dangerous, must use its power of persuasion exclusively for conciliation to induce cooperation. It must appeal to self-interest, seen in the light of the interests of all concerned. There must be an entire absence of threats, secret pressure, or other form of terrorization. Partisan politics must never be allowed to influence its personnel or work, or that of its delegation in any nation. Its independence and impartiality must be absolute, and should be jealously prized and guarded by the people.

It should be impossible in the future for any conferences to be held when secret treaties exist affecting the

objects discussed, unknown not only to the nationals of the countries involved, but to the very parliaments themselves, as has been the case in the past. The fundamental work of the international body must be, through its delegation in each nation, to instruct the masses concerning the international status, the situation of their own nation, the attitude of their own national administration toward international affairs and the reasons for and against it, as clearly and definitely as is compatible with the public interest; so that public opinion, instead of being swayed by ignorance, by prejudice or by local self-interest, will be sound and enlightened and a source of strength in any crisis.

Conciliation necessarily involves the acceptance and promulgation of democracy, republicanism, and cooperation; that is, in a word, the two great commandments of the New Testament. It implies government by consent, since conciliation by the government and consent by the governed are correlative. The philosophy which it must inevitably act upon and inculcate, if it acts logically, is the philosophy of cooperation—that each man and each nation can gain more by voluntarily cooperating with all others in utilizing the forces of nature for human development and by participating equitably in the common product, than is possible by isolated or competitive action.

The principle of conciliative direction of the international acts and relations of nations by international agencies, is the fundamental principle on which the Convention for Pacific Settlement is based. The first part of that convention is devoted to "good offices and mediation;" the second to "arbitration." "Good offices and mediation" are merely diplomatic terms to express two elements of the whole process of international conciliation. Though the convention, as has been said,

creates no general international agency of international conciliation, nevertheless by its legitimation and approval of good offices and mediation by one nation as respects disputes between other nations, and by its recommendation to disputant nations to institute commissions of inquiry for the settlement of the dispute as international conciliative agencies, it recognizes international conciliation as a proper and feasible means of directing international action. The establishment of means for international legislation and administration by conciliation, therefore, would not require the nations to accept a new principle. It would only be the carrying-out to its logical conclusion of a principle which they have already accepted. The problem of bringing about efficient international legislation and administration is that of formulating a scheme of international legislation and administration based on the accepted principle of international conciliation, which shall be acceptable to the nations as being for their general and particular self-interest; and of fitting this scheme into the present scheme of international adjudication and national conciliation established by the Convention for Pacific Settlement, so as to expand that convention into a complete written constitution of the society of nations.

The proper organs of an international political body for effecting international legislation and administration by conciliation would not, it seems, be a legislature and an executive exactly in the sense in which we use these terms, but would resemble what in our large civic associations and our business trusts (and, indeed, in nearly all associations of a purely voluntary and co-operative character) we call an executive committee and a general committee. The body corresponding to an executive committee might be called the ordinary

international directorate, and the one corresponding to a general committee, the superintending international directorate. The ordinary directorate would, through its members, aided by such subordinate committees and expert assistants as might be found necessary, and by the local delegations in each nation, do the continuous administrative work of conciliation—making investigation of facts, formulating its counsel on the facts as ascertained, and doing everything proper, short of using physical force, to induce the adoption of the counsel by the national governments concerned. The superintending directorate, meeting occasionally or periodically, would, as chief administrative, superintend the administrative action of the ordinary directorate by formulating different counsel in particular cases, and would also act legislatively by laying down general rules applicable to general classes of international activities. These general rules would be primarily for the guidance of the ordinary directorate in its conciliative work. Incidentally they would be for the guidance of the nations and their people in the classes of international activities to which the rules would relate.

The ordinary directorate would doubtless be more effective if it were to be an appointive body. The members might be appointed by a body corresponding to the Permanent Administrative Council established by the Hague Conferences, or by the superintending directorate. The superintending directorate would doubtless be most efficient if it were to be a representative body. The system adopted in the United States of having a Senate and a House of Representatives, the one representing the nations as equals, and the other representing districts of equal population, would seem to be applicable.

The composition of the membership of the directo-

rates would be a matter of prime importance. There would doubtless need to be stringent rules determining the eligibility of persons to membership in either directorate, particularly in the ordinary directorate. The use of conciliation as a governing force so as efficiently to direct the action of masses of men, by their own consent, into activities which are to their self-interest and also to the interest of all, is expert work of the highest character. No one should be eligible to such an official station who is not naturally endowed with great intellect and conscientiousness, and who has not added as much as possible to his natural powers by education, by study and research, by travel enlightened by knowledge of languages, and by actual experience in government.

Under an international conciliative directorate, international legislation would be effected, as at present, by the conventional enactments of conferences of all nations ratified by the separate nations, or by the fixation of international custom through coinciding treaty and diplomatic action of many nations; but in addition it would be effected by the general rules laid down by the superintending directorate for the guidance of the ordinary directorate, by the ordinary directorate in following its own precedents of counsel, and by uniform national legislation and treaty action respecting international matters, this uniformity being brought about by the conciliative action of the international directorate. Each nation would be regarded as having not only exclusive powers of government within its own borders and over its own purely internal activities, and over all its citizens and corporations as respects their international activities, but also concurrent full powers of government with all other nations over the high seas, and concurrent limited powers of government

over the international trade routes, natural and artificial, and over all regions held as dependencies by any one nation. The international directorate and the national legislatures and treaty-making organs, acting uniformly in international affairs, would all together constitute the international legislature. International conferences for framing rules of international law, subject to ratification by the nations, might also be held, if deemed advisable.

The international administration would be conducted by the two directorates and the executives of the different nations; the latter enforcing, each upon its own nationals and corporations, in a uniform manner recommended by the international directorate, the international legislation enacted in manner above described. The international administrative would thus be composed of the international directorate and the particular national executive engaged in enforcing a particular act of international legislation.

The present Permanent International Court of Arbitration, and the Permanent Court of Arbitral Justice already agreed to in principle by the Second Hague Conference, would remain as the supreme judicial organs of the society of nations; their decisions being advisory and being reported by the respective courts to the ordinary directorate so that it might secure their enforcement through conciliation of the nations concerned. Doubtless in the long run international district courts would be established in correspondence with the Permanent Court of Arbitral Justice, each district comprising one large nation or a group of smaller nations. These district courts might have final jurisdiction in non-constitutional cases in which the rights involved were really those of individual nationals of different nations, subject to *certiorari* from the Perma-

nent Court of Arbitral Justice. The Permanent Court of Arbitral Justice might have appellate jurisdiction over the district courts in constitutional cases between individual nationals of different nations, and exclusive jurisdiction in suits between nations involving strictly national rights as distinct from the rights of individual nationals. The nations would of course remain at liberty to settle their disputes by arbitration conducted by arbiters of their own choice, if they saw fit.

The primary power which would need to be delegated to the international directorate would be the power to bring about, through conciliation applied to national governments so as to induce uniform national legislation and treaty action, the internationalization and freedom of the high seas and of the international trade routes, including international railroads, canals, straits, sounds, and rivers. This would involve a conciliative direction of international trade, finance, intercourse, and migration. Power might also be delegated to the international directorate to bring about, by the same conciliative action, a more or less complete internationalization of backward countries held as dependencies of separate nations; such internationalization to be effected by each nation holding dependencies adopting a more or less open-door policy, determined in each case by the local circumstances of each dependency, as respects concessions for internal improvements and for carrying on manufacturing, mining, trade, transportation, and banking in these countries; the ultimate goal being the equalization of economic opportunity among all the nations.

The exceptional cases in which the police and taxing power, or the police power alone, might properly be granted to the international directorate would, it seems, be of three kinds. First, if a district were provided as

the seat of international direction, the international directorate would necessarily have the power of local police and local taxation within the district; second, if the high seas, as an international area by reason of being the common property of all nations, were to be freed from national naval vessels as the results of destructive inventions and the successful working of the international directorate, the international directorate might be granted authority to patrol the sea routes for police purposes; and, third, if zones or districts bordering on straits, canals, or rivers were internationalized by special international agreement, the international directorate might be granted authority to maintain a police patrol within the internationalized zone or district.

The whole directorate, composed of the ordinary directorate and the superintending directorate, together with the international courts—which might be called the general international directorate—would be financially supported in the same manner as is the present international body located at The Hague. The Convention for Pacific Settlement provides that the expenses of the present Hague organization "shall be borne by the signatory powers in the proportion fixed for the International Bureau of the Universal Postal Union." The convention establishing the Universal Postal Union actually fixes the proportions to be paid. Doubtless no better system could be devised at the present time.

The safeguards around the international directorate would be primarily, the substantial denial of power to use physical force, which would carry with it a denial of general taxing power; secondarily, the requirements that in its action it should deal exclusively with the national governments, that it should use conciliation and persuasion exclusively; that it should be composed

of experts and superintending experts; that it should have a specific sphere of powers relating to the seas as the common property of all nations, to the international trade routes as subject to the common use of all nations, and to colonies and dependencies as subject to a qualified common use by all nations; and, thirdly, the provision that it should never be reduced to the necessity of begging money from the nations or asking protection from any nation, but should be assured, in advance and permanently, by an agreement of all nations, an adequate and dignified support, and perhaps also an appropriate seat of international direction exclusively governed by itself.

It is incumbent on the United States to see to it, so far as may be in its power, that no international directorate is ever established except under a written constitution delegating carefully limited powers and ratified by all, or at least two-thirds of the nations; and that the written constitution shall be plainly such on its face—not merely in substance, but also in form. It is incumbent also upon the United States to see to it that this constitution shall contain a plain and distinct recognition of the universal and fundamental principles which lie at the basis of all orderly and peaceful society. The insistence of Americans on written constitutions is not a mere American idiosyncrasy. Written constitutions are a vital and essential part of the American system, regarded as a universal system. By the Declaration of Independence, the American people committed themselves to maintenance of the proposition, as a universal and self-evident truth, that all men are equally the creatures of a common Creator, and that there are therefore certain rights of every human being, of which he cannot by his own action deprive himself, which arise from the nature of man as

a spiritual being and from the equal endowment of each man by his Creator with the attributes of life, the will to live, and the desire for happiness, which are common to all; so that these fundamental and universal rights exist antecedent to and independent of every government, however great and powerful. This fundamental and necessary limitation upon the power of all governments requires recognition by all governments through a written constitution; and since all the subordinate rights of individuals established by governments must be derived from and consistent with these fundamental rights, written constitutions are also necessary in order to enable the people governed so to frame their government and so to limit and safeguard it, by general declarations, by specifications of powers, and by prohibitions, that it will certainly respect and secure the fundamental principles which underlie all human society and the fundamental rights of individuals and nations based on these fundamental principles.

Therefore it would be necessary that the written constitution of the society of nations establishing the international directorate should contain a declaration of the universal and fundamental principles of all human action and relationship such as is contained in the first sentence of the second paragraph of the preamble of the Declaration of Independence; a declaration of the fundamental rights and duties of nations, such as that which has been adopted by the American Peace Society and the American Institute of International Law; a declaration of the objects of the constitution, modeled upon the preamble of the Constitution of the United States; and also, if possible—after the provisions instituting the different parts of the general international directorate, defining their composition and the relations of one to the other, and determining the sphere of

jurisdiction of the whole directorate and each of its parts by a specification of powers—a bill of rights democratizing and republicanizing the relations between the government of each nation and the people of the nation by establishing prohibitions, absolute or conditional, upon certain forms of governmental action found by experience to be injurious or destructive to liberty.

The institution of such an international directorate as has been above proposed would not disturb any of the existing agencies or processes by which international activities and relations are now directed. The nations would retain their ministries of foreign affairs, their ministries in charge of dependencies, their diplomatic and consular officers and their courts functioning in international cases. The judicial tribunals and the administrative arrangements ancillary to them, established by the Hague Conferences, would be unchanged. Upon the present international mechanism the international directorate would be superposed as a means of bringing all the existing agencies and processes into cooperation and harmony.

The international directorate proposed would be but an application on a universal scale of the system which nearly all nations having dependencies have found necessary in the management of their colonial empires. The Privy Council and the Council for India in Great Britain, and the colonial councils of the European nations, which, under the ministries for the colonies and dependencies, manage the colonial empires of these respective nations, are in principle interstate directorates, holding together widely separated countries, diverse in race, climate, and civilization, by methods which are essentially conciliative. Though these interstate directorates are backed by the physical force of the nation,

physical force has been found to be inapplicable in holding dependencies to nations except when used sparingly and scientifically in aid of conciliation, and in many cases to be wholly inapplicable. The superintending directorate in colonial empires is in process of evolution, and in one or more of them will doubtless soon be a fact. The problem of holding together the widely separated nations of the world, diverse in race, climate, and civilization, is clearly analogous to the problem of managing colonial empires. The only difference is, that the international directorate must be a delegated body, instituted by all the nations, which shall be of and for them all, and shall carry the principles of democracy and republicanism into international relations. (Cf. "The Administration of Dependencies," by the author of this article, pp. 527–530, 578–604, as respects the management of colonial empires by directive councils and superintending directive bodies, and the applicability of the directorate form of government in political aggregations where the federal-state form is inapplicable.)

The plan proposed would, of course, not be a panacea for all international ills. Each nation would continue to be free and independent. It would reject or accept the counsel of the international directorate according as it thought its self-interest demanded. Secret treaties and other forms of intrigue, and excessive national armaments to support the intrigues, would doubtless continue to go on. Domination of the seas, of the international trade routes, and of the backward countries by individual nations or by a league or leagues of nations, would no doubt continue to be attempted. Invisible international government, in democracies and monarchies, would undoubtedly continue to be the dream of political, financial, and trading syndicates, and to have

a more or less stable *de facto* existence. Attempts would probably be made to pervert the international directorate to selfish national ends. Therefore war would continue to be possible. But a means would have been provided for the gradual abolition of all these abnormal processes and agencies and for the limitation, by the free act of the separate nations, of the excessive national armaments which make these abnormal processes and agencies possible. Excessive national armaments will be limited by the voluntary act of each nation when it ceases to be for the self-interest of each nation to maintain an excessive armament. When an international organization, by its successful operation, has made some part of a nation's armament unnecessary and therefore excessive, the nation will, as a matter of common sense and economic necessity, scrap the part which is excessive, and release the capital and labor for productive employment. Limitation of national armament in any other manner is, it would seem impossible. In this manner it may be possible.

That some such international conciliative directorate as has been suggested, exercising legislative and administrative as well as judicial direction of the nations as respects international matters, must sooner or later be established, would seem to be beyond doubt. Destructive inventions have made the strong nations and the weak nations almost equally strong and equally defenseless. Constructive inventions have enabled all men and nations to share equally in the common necessities of life and in the common knowledge. All the races of men are rapidly becoming equal in physique and intelligence, and equally cognizant of their fundamental rights.

The proper time to begin the institution of the new system would seem to be the present moment. The

questions of national existence and boundaries which are now the obstacles to peace, are almost entirely questions incidental to the rival ambitions of great powers. As things now are, small nations occupying strategic positions on international trade routes cannot be allowed independent existence within boundaries determined by the principles of nationality and equality of national right and opportunity. These small nations must, under the present system, be given such boundaries and allowed such privileges as are consistent with the political and economic policies of the nation or group of nations which for the moment holds the balance of power and dominates the particular international trade routes on which these small nations are situated. So long as there is no international direction to modify and gradually to supplant the present system of the balance of power, that system will remain, involving all the great powers in the struggle for world power, and leaving the small and strategically important nations in a condition of perpetual uncertainty as respects their boundaries, their privileges, and even their national existence. A conclusion of the war which should determine, according to the exigencies of the balance of power, the relations of the great powers to each other and the privileges and boundaries of smaller nations, would greatly complicate the future. Such a peace, as laying the foundation for a greater war in the future, might prove a worse calamity than the war itself. The most certain assurance against a peace of this kind would seem to be a unanimous agreement between the great powers, entered into during the war, accepting the principle of an international conciliative direction after the war.

Once such an agreement were signed, it would be possible for the great powers, in the treaty of peace,

with safety to each and all and without loss of dignity to any, to adjust properly the relations of each to the other and to determine scientifically and fairly the questions concerning the existence, rights, and boundaries of the smaller nations and the claims of the nationalities which are aspiring to nationhood. A treaty of peace so made would form a sound basis for the future orderly and peaceful cooperative development of all nations, and would greatly simplify the work of the international directorate which would be formally instituted after the war through a constitutional convention of all nations.

LEGAL LIMITATION OF ARBITRAL TRIBUNALS

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UNTIL the year 1776, the doctrine prevailed universally among the civilized nations that there must be one part of the government of every independent state in which was vested legally unlimited power; the part of the government which exercised this legally unlimited power being regarded as the source of the law of the state. In some states, this legally unlimited power was regarded as vested in the Monarch; in others in Parliament.

In 1776, as the result of ten years' consideration by the American Colonies of the claim of Great Britain that its Parliament had the right to exercise legally unlimited power over them, the United States of America came into existence under a Declaration of Independence, which was at the same time an Agreement of Union, and the preamble of which was a Fundamental Constitution of the United States. By this Fundamental Constitution,—which today exists in full force, underlying the Constitution of 1787,—a new political doctrine was advanced and a new political system was founded. According to this Fundamental Constitution, all governmental power is held to be legally limited—primarily by the principles of supreme universal law, and secondarily by the supreme organic law of each particular society, made theoretically by all the people of

the society assembled, and determining the structure of the society and the relations of the parts. The principles of supreme universal law are those which grow out of the nature of man and society. Each political society as a necessity to its own existence is regarded as securing to each individual his self-protection and self-preservation—the protection and preservation of the individual being necessary to the protection and preservation of society. These rights of the individual, growing out of his human nature and his relation to his Creator, and out of the nature of human society, are held to be "unalienable" and hence universal. The Declaration does not purport to state all the principles of the supreme universal law. It only declares that "among" these unalienable rights are the rights of "life, liberty and the pursuit of happiness." The rights thus named are clearly rights of self-protection and self-preservation. On the necessity of self-protection and self-preservation in order that society may exist, and on the necessity of there being an organization of every society, made theoretically by all the people assembled, before there can be a government, the preamble of the Declaration of Independence based the American doctrine that all governmental power is by the necessity of the case legally limited. The American doctrine of legally limited governmental power became thus opposed to the European doctrine of legally unlimited governmental power, and there was founded an American system which was opposed to the European system.

The success of the United States in the American Revolution established the American system. In 1787, the Constitution of the United States was adopted, giving to the world a proof that the American system could be worked out in a practical form. By the Con-

stitution, the theory of the Declaration was translated into a political fact.

In 1823, the South American countries had become independent and free to choose whatever system they might prefer. The "Holy Alliance" of the powers of Continental Europe threatened to extend the European system to South America by force. In that year President Monroe, with the informal concurrence of both Houses of Congress and with the approval of the American people, in a Message to Congress, announced as the distinctive policy of the United States, that the European system should not be extended to the Western Hemisphere by European force, on the ground that such an extension would tend to destroy the American system, which the people of the United States believed to be essential to peace and order. In that Message he said:

> The political system of the Allied Powers is essentially different . . . from that of America. This difference proceeds from that which exists in their respective governments; and to the defence of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor and to the amicable relations existing between the United States and those Powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. . . . It is impossible that the Allied Powers should extend their political system to any portion of either continent without endangering our peace and happiness.

The Civil War abolished slavery and thus removed the inconsistency between our doctrine and our prac-

tice, which had up to that time led to impossible compromises and to an attempt to regard the preamble of the Declaration as a statement of "glittering generalities." By the Fourteenth and Fifteenth Amendments to the Constitution the American system was completed.

The European system of legally unlimited governmental power results logically in what is called the "sovereignty" of independent states. "Sovereign" states live theoretically in a condition of omnipotence and unsociability. When they come into contact with other "sovereign" states, they fight or agree. "Sovereign" states are theoretically not subject to "law"; they are above law and make law for non-sovereign communities which they control by force. Hence on the European system judicial settlement of disputes between nations is theoretically inconceivable, and arbitration tends to be only a political compromise made by high diplomatic officials when the ordinary diplomatic officials are unable to agree.

According to the American system, there is no governmental omnipotence and hence no state omnipotence. States are merely large corporations created by the people of the states assembled for the purpose of collective and individual self-protection and self-preservation, and organized and vested with specific powers for this purpose. Like other corporations, states are assumed to exist in society. They are hence amenable to law, and disputes between them are to be settled by courts. Hence the Supreme Court of the United States has jurisdiction of cases to which the United States is a party and of controversies between states. The American states willingly submit their differences to settlement by the Supreme Court, because that Court, like every other part of the American Government, acts under the Bill of Rights and the other provisions

of the Constitution and is legally limited by all the applicable provisions of the Constitution in each case that arises before it. In the United States proper, the Supreme Court is legally limited by all the provisions of the Constitutional Bill of Rights, in their literal sense; and also by the organic provisions of the Constitution—the provisions which determine the relations of the states to each other and to the United States—in their literal sense. In the political society composed of the United States and the countries and places under its jurisdiction, the Supreme Court is legally limited, as it has recognized by its own decisions, by those provisions of the Constitutional Bill of Rights which are of universal import, and by the organic provisions of an unwritten or customary Constitution, based on the Constitution of the United States and formed by applying the provisions of that Constitution, not in their literal sense, but according to "the general spirit of the Constitution," as reasonable customs, in such manner as may be needful to suit the circumstances of this greater political society and its component parts.

In suits between states, or to which the United States is a party, the Supreme Court, acting under the Constitutional Bill of Rights, holds void and ignores any governmental action occurring in the United States or in any country or place under its jurisdiction, which deprives any person or personality of his or its life, liberty or property without due process of law; and upholds the organic provisions of whichever Constitution may be involved—the written Constitution in the case of the political society known as "the United States of America," and the unwritten one in the case of the greater political society composed of this nation and the countries and places annexed to it and under its jurisdiction.

The United States, however, three years ago agreed by treaties with a number of foreign nations, to submit to arbitration certain kinds of disputes which it might have with them, and it is now proposed to extend some of these arbitration treaties so that they will cover a much wider field. The question arises whether these treaties, if they are constitutional, are consistent with the American system; or to state it differently, whether these treaties, if they are constitutional, do not commit the United States to the European system.

The arbitration treaty between the United States and Great Britain of 1908, and the other existing arbitration treaties of the same year and of later date, provide, among other things, as follows:

"Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July, 1899; provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting States, and do not concern the interests of third parties.

"In each individual case the high contracting parties, before appealing to the Permanent Court of Arbitration, shall conclude a special agreement defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal and the several stages of the procedure."

Nothing is said in these treaties concerning any legal limitations on the power of the tribunal. The parties are in each case to conclude a special agreement "defining . . . the scope of the powers of the arbitrators." The Convention for the Pacific Settlement of Inter-

national Disputes, of the 29th of July, 1899, likewise makes no mention of legal limitations upon the powers of the arbitral tribunal. By that Convention it was agreed that "international arbitration has for its object the settlement of differences between states by judges of their own choice, and on the basis of respect for law." The arbitrators are to be persons "of known competency in questions of international law," and the powers who have recourse to arbitration are to sign a special act in which "the extent of the arbitrators' powers" is to be "clearly defined." (Articles, 15, 23, 31.) There is nowhere in the treaties or in the convention any suggestion of limitations upon the arbitral tribunal under a law which is binding upon the tribunal and the disputant nations. The expression "on the basis of respect for law" is indefinite and recommendatory, binding the tribunal to nothing. The powers of the arbitrators are legally unlimited. They may be restricted by the agreement of the parties, but they are not restricted by law.

It may therefore happen that a case between states, or involving a dispute between states, which has been tried by the Supreme Court of the United States acting under all the applicable provisions of the Constitution, and which has been decided by it with reference to these limitations, may be retried in an arbitration proceeding by a tribunal which is without any legal limitation whatever, and decided in an entirely different manner. So the arbitral tribunal may decide a case on the principle of political compromise or on the principle of regulating the balance of power, and without attempting to apply legal principles. Of course, these difficulties might to some extent be met by the special agreement made in each case; but any limitations upon the powers of the arbitrators arising out of the agree-

ment would not resemble, either in form or in effect, those legal limitations which rest upon courts as parts of a system of government based on legally limited powers.

The existing treaties provide that they shall expire in five years from the date of their ratification. This fact, coupled with the fact that they apply only to a small class of cases and reserve to each disputant nation the right to withdraw cases from arbitration, makes these treaties of little consequence as providing an immediate substitute for war. Whenever there is any danger to one of the contracting nations from a proposed arbitration, the case is withdrawn from arbitration by that party as one affecting its "vital interests, independence or honor."

New treaties have recently been signed with Great Britain and France for the purpose of extending the practice of arbitration to all "justiciable" cases and making withdrawal of "justiciable" cases practically impossible. The question whether these treaties shall be ratified is one of great importance. We have no longer to consider treaties which apply only to a small class of cases, which reserve to each of the disputant nations an almost discretionary right of withdrawing cases from arbitration, and which are to be in force for a short period. If the pending treaties are ratified, and if they are constitutional, arbitration of most of the disputes between the contracting nations will become a permanent institution, and tremendous interests will be involved.

The pending treaties provide, among other things, as follows: (Article I.)

"All differences hereafter arising between the high contracting parties, which it has not been possible to adjust by

diplomacy, relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of October 18, 1907, or to some other tribunal, as may be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, define the scope of the powers of the arbitrators, the question or questions at issue, and settle the terms of reference and the procedure thereunder.

"The provisions of Articles 37 to 90, inclusive, of the Convention for the Pacific Settlement of International Disputes concluded at the second Peace Conference at The Hague on the 18th October, 1907, so far as applicable, and unless they are inconsistent with or modified by the provisions of the special agreement to be concluded in each case, and excepting Articles 53 and 54 of such convention, shall govern the arbitration proceedings to be taken under this treaty."

These treaties, it will be noticed, are the same as the existing treaties, in the fact that they do not recognize any legal limitations as binding on the arbitral tribunal. A special agreement is to be made defining the scope of the powers of the arbitrators, but neither in this provision, nor in the Convention of 18th October, 1907, is there any legal limitation recognized. Article 37 of this Convention is the same as Article 15 of the Convention of 1899, and declares that international arbitration is to proceed "on the basis of respect for law." "Justiciable" cases are to be submitted to arbitration and justiciable cases are defined as those "susceptible of decision by the application of the principles of law or equity"; but there is no requirement that the arbi-

trators shall decide these justiciable cases according to the principles of law or equity, and no legal limitation of any kind is recognized as binding upon them.

The provision limiting the withdrawal of cases from arbitration on the ground that they are not "justiciable" is as follows: (Articles II and III.)

"The high contracting parties further agree to institute as occasion arises, and as hereinafter provided, a Joint High Commission of Inquiry, to which, upon the request of either party, shall be referred for impartial and conscientious investigation any controversy between the parties within the scope of Article I, before such controversy has been submitted to arbitration, and also any other controversy hereafter arising between them, even if they are not agreed that it falls within the scope of Article I. . . .

"It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the Joint High Commission of Inquiry; and if all or all but one of the members of the Commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this treaty."

This last paragraph has been held by the majority of the Senate Committee on Foreign Relations to have the legal effect to obligate (or attempt to obligate) this nation to arbitrate any dispute with Great Britain or France which the Joint High Commission shall hold to be arbitrable (justiciable) either by a unanimous vote or by the vote of a majority which includes all but one member. The majority of the Senate Committee, in their report of August 15, 1911, therefore recommended the omission of this paragraph as attempting to impair the constitutional power of the Senate to ratify treaties, by delegating to a tribunal the right to decide the

question of arbitrability of international disputes. After quoting the last paragraph above quoted, it was said:

"It will be seen by examination of the clause just quoted that if the Joint Commission, which may consist of one or more persons, which may be composed wholly of foreigners or wholly of nationals, decides that the question before them is justiciable under Article I, it must then go to arbitration whether the treaty-making power of either country believes it to be justiciable or not. A special agreement, coming to the Senate after the Joint Commission had decided the question involved to be justiciable, could not be amended or rejected by the Senate on the ground that in their opinion the question was not justiciable, and did not come within the scope of Article I. . . .

"In approving Article I of the treaty the Committee assents to the arbitration of all questions coming within the rule there prescribed. The terms in which the rule is stated are, however, quite vague and indefinite, and they are altogether new in international proceedings. It is possible that others may take an entirely different view from that entertained by the Committee or by the negotiators of the treaty as to what was meant by justiciable or as to what was meant by the principles of law or equity when applied to international affairs, and in the absence of any established rules of international law for the construction of such provisions and of any precedents, others might put upon these provisions a construction entirely different from that which the treaty-making power now intends. Under these circumstances to vest in an outside Commission the power to say finally what the treaty means by its very general and indefinite language is to vest in that Commission the power to make for us an entirely different treaty from that which we supposed ourselves to be making."

The effect of the treaties, is, therefore, in the opinion of the majority of the Senate Committee, to attempt

to establish a system of joint judiciary for the three nations, and to delegate to the joint judiciary the power to determine the limits of its own jurisdiction.

On November 8, 1911, Secretary of State Knox delivered an address on "The Pending Arbitration Treaties" at Cincinnati, before the American Society for Judicial Settlement of International Disputes, in which he placed a different meaning on the paragraph in question. In that address, the Secretary of State quoted the following provisions from the pending treaties:

(From the Treaty with Great Britain.) "The special agreement in each case shall be made on the part of the United States by the President of the United States, by and with the advice and consent of the Senate thereof, His Majesty's Government reserving the right before concluding a special agreement in any matter affecting the interests of a self-governing Dominion of the British Empire to obtain the concurrence therein of the Government of that Dominion."

(From the Treaty with France.) "The special agreement in each case shall be made on the part of the United States by the President of the United States, by and with the advice and consent of the Senate thereof, and on the part of France subject to the procedure required by the constitutional laws of France."

The Secretary of State in his address said:

"Although in the pending treaties the Executive branches of the Governments concerned agree to be bound by the decision of the Commission as to the arbitrability of a question upon which the Executive branches do not agree, this decision is subject to the approval of the self-governing Colonies of Great Britain, if the question affects them, and to the approval of the Senate of the United States, and in

certain cases the Senate and Chamber of Deputies of France, to whom the right of approval is expressly reserved in each case.

"Every agreement to arbitrate must go to the Senate for its approval. There can be no arbitration without its approval. An agreement to arbitrate goes to the Senate for its approval either because the Executive branches of the two countries concerned in the difference agree that the difference is one for arbitration or because, failing so to agree, the Commission of Inquiry report that it is such a difference.

"How can the Senate's power over the agreement be less if it goes to the Senate after the Commission's report that it presents an arbitrable question than if it had gone there because of the opinion of the Executive branches of both Governments to the same effect?

"If the two Governments agree that the difference is arbitrable, they make an agreement to arbitrate it and it is sent to the Senate for its approval. If the two Governments cannot agree that the difference is arbitrable that ends the matter until the Commission reports, and if its report is that the difference is arbitrable, an agreement is made to arbitrate it and the agreement is sent to the Senate for approval just as if no such question had been raised, and the Senate deals with it with unimpaired powers."

The Secretary of State thus asserts that the true construction of the pending Treaties is, that "the Executive branches of the Governments concerned agree to be bound by the decision of the Commission as to the arbitrability of a question upon which the Executive branches do not agree," and that at the same time, after a decision has been made by the Joint High Commission that a certain question is arbitrable (justiciable), the Senate of the United States, by reason of the reservation of its powers respecting the special agreement in each case, deals with the question of

arbitrability "with unimpaired powers." The last paragraph of Article III, as construed by the Secretary of State, should, therefore, in order to conform to his construction, read as follows:

"It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this Treaty, that question shall be submitted to the Joint High Commission of Inquiry; and if all or all but one of the members of the Commission agree and report that such difference is within the scope of Article I, the Executive branches of the Governments concerned shall be bound by the decision of the Commission as to the arbitrability of the question, but the Senate of the United States in all cases (and also a self-governing Dominion of the British Empire in cases involving its interests under a treaty signed by Great Britain; and also the Senate and Chamber of Deputies of France in cases where they have the constitutional right of ratification of treaties signed by the President of the French Republic) may, by virtue of their reserved rights regarding special agreements hereunder, deal with the question of arbitrability with unimpaired powers."

The power of the Senate of the United States under the Constitution is to advise with the President concerning treaties and to accept, amend or reject them. There is no power given by the Constitution to the Senate to veto the conclusions of a political tribunal or to overrule the decisions of a judicial tribunal.

The meaning given to the pending Treaties by the Secretary of State would make it possible for one part of the Government of the United States—the President—to be bound by the decision of a tribunal regarding a foreign matter, while another branch—the Senate—was not bound. Such a situation would seem likely

to result in a war which would be at once civil and international.

The action of the Senate of the United States in overruling a decision of the Joint High Commission would not resemble that of a self-governing Dominion of the British Empire in overruling such a decision. The Dominion would in this case act as a third party whose interests were affected and who refused to be bound by the act of Great Britain. Nor would the action of the Senate of the United States resemble that of the Senate and Chamber of Deputies of France in overruling such a decision; for there can be no doubt but that if both these Chambers united in overruling such a decision, the matter would be settled so far as France was concerned, since the two Chambers together would certainly represent the united will and purpose of the people of France. To place the responsibility on one Chamber in such a case is far different from placing it on the two Chambers.

The interpretation placed on the pending treaties by the Secretary of State is, of course, not binding unless acquiesced in by the Senate and by the nations which are parties to the pending treaties. Therefore, as there exists a difference at present between the majority of the Senate Committee and the Secretary of State as to the meaning of the treaties, the opinion of the majority of the Senate Committee will, for the purposes of this article, be assumed to be correct. If the pending treaties have the meaning given to them by the Secretary of State, it would seem that, though they may perhaps be constitutional, it is improbable that they will be supported by the public sentiment of the nation. If they have the meaning attributed to them by the majority of the Senate Committee, the point made in their report that the treaties are unconstitutional as impair-

ing the constitutional right of the Senate to ratify treaties seems unanswerable. There are, however, some other considerations regarding the pending treaties, on this construction of them, with which it is the purpose of this article to deal.

These treaties are, it would seem, objectionable because they attempt to subject a great and indeterminate part of the foreign interests of the United States to a tribunal which exercises powers without legal limitation—that is, to a tribunal which exercises arbitrary power—without reserving to the President, or to the President and Senate, or to the Congress, an unimpaired discretionary power to withdraw cases from arbitration sufficiently broad to enable us to protect our system and our vital interests.

We submit all our domestic questions to legally limited tribunals. Consequently, it seems clear that if we adopt the system attempted to be established by these treaties, we shall to that extent abandon the American system and adopt the European. That which we fought the Revolution to gain, that which we defended by the Monroe Doctrine, that which we waged the Civil War to perfect, we shall voluntarily yield. The European and American systems will have met, and the European system will have prevailed. It is highly improbable that the decisions of a legally unlimited tribunal would lead to peace. We obey the Supreme Court because it is legally limited, and because it acts within these established limits and for certain definite purposes, as a part of the carefully wrought out mechanism of our government. We shall not be likely to obey a tribunal which has no legal limits, which is bound by no law, which is disconnected from the government of any nation, and which exists above the nations which create it, theoretically omnipotent

except as the disputant nations make subtractions from its omnipotence by a special agreement in each case. Such a tribunal might ignore the international *status quo*, or it might uphold national action which deprived persons, corporations or communities of life, liberty or property without due process of law, or which impaired the obligation of contracts, or which imposed compulsion in religious matters, or it might force the parties to make a political compromise. If an unsatisfactory decision should be made by such a tribunal and if the American people should be met by the claim that they had consented by these treaties to the exercise of arbitrary power, they would doubtless answer, as their Revolutionary ancestors did when British philosophers asserted that they had consented to the exercise of legally unlimited power over them by the British Parliament by reason of their having accepted royal charters, that consent to the exercise of legally unlimited power is a nullity, and acquiescence in the exercise of such power impossible.

It may be said that the power exercised by the arbitral tribunal is judicial, and that judicial power is not arbitrary power. That, however, is not American doctrine. We bind our courts by legal limitations, equally with our legislatures and our executives; for we know by experience that arbitrary power may be exercised under the judicial guise and that this is the most insidious of all forms of arbitrary power.

But it may be said that it is impossible to impose on arbitral tribunals legal limitations like those which the people of the United States impose on their courts; and particularly like those which they impose on the Supreme Court of the United States when it sits as a tribunal to settle disputes between States. In view of this supposed impossibility, it may be urged that it is

necessary that we trust our lives and properties in disputes with other nations to tribunals with arbitrary power, as a course of action more conducive to peace and order than fighting. The experience of mankind, however, proves that the only decisions that keep the peace are those made by courts, that is, by tribunals which act as a part of the machinery of a political society, which are legally limited by the fundamental principles of supreme universal law duly formulated, and by the organic constitution of the society; and which apply and interpret the law of the society in cases duly brought before them. Decisions of persons or tribunals having arbitrary power lead quite as often to disorder as to order.

It therefore becomes important that we examine the proposition that it is impossible that tribunals for settling disputes between nations should have legally limited powers. This requires an investigation of some of the fundamental ideas which yet prevail in some quarters concerning the relations between independent states.

These relations, as explained by many publicists, are based upon two contradictory principles. Independent states are for some purposes considered as persons not living in society, who fight or agree. When so considered, their relations are "international." They are also for some purposes considered as social units and as component parts of the society of nations. When so considered, their relations are under a "law," which is imposed on them by the society of nations. In political thinking, these two ideas are continually attempted to be blended. Jeremy Bentham in 1780 invented the expression "international law," and this expression has come into quite general though not universal use. We have become so habituated to it that we do not stop

to consider that it is meaningless. Law comes from a political society which is above the persons who are subject to the law; it never comes from "between" or "among" the persons who are subject to the law. There may be a law of the society of nations, which binds the nations as members of the society; and there may be a law of a group of nations united so as to form a particular society of nations; but there can be no other kind of "law" which is of any effect upon the nations. The expression "international law" is as unthinkable as a black white.

The Constitution uses the expression "the law of nations" instead of "international law." The former expression occurs in the 10th clause of Article I, Section 8, by which Congress is given power to "define and punish . . . offenses against the law of nations."

The vogue which the expression "international law" has had is doubtless due to the confusion of the idea of agreement and the idea of law—the fallacy lying in the assumption that law is essentially nothing but agreement. Recent investigations and study in jurisprudence have shown the true connection between the two ideas. Law, in the sense of jurisprudence, is a body of rules of action or relationship formulated by a political society, which the society enforces upon its members. The society exists by agreement and its action is determined by the agreement of those who have the majority of power. But the political society always intervenes between the agreement and the law,—the agreement makes the political society, and the political society recognizes or makes the law. The moment we should attempt to speak of interpersonal law, the absurdity of the expression "international law" would become apparent; for our common sense and experience would immediately show us that we do not

obey our agreements, and that we do obey the law which the political society of which we are members imposes on us—the political society being established, maintained and operated by our agreements.

If we dismiss the idea of "international law," and take as the basis of our political thinking the proposition that the only law which can bind a nation is that which is imposed upon it by a political society of nations, of which it is a member, the difficulty about there being legal limitations upon tribunals which decide disputes between nations begins to disappear. A logical basis for legal limitations upon such tribunals is established and the difficulty which remains is, to define the legal limitations.

A particular society or union of nations may be organized for legislative purposes, or for executive purposes, or for judicial purposes, or for all of them. If two or more nations should agree to establish a court for the settlement of disputes between them, they would be united in a judicial union. A judicial union would imply the establishment by the political society composed of the uniting nations of a common federal law emanating from the union.

It would be possible, therefore, for the United States, Great Britain and France, and other nations which they might associate with them, to enter into a judicial union for the purpose of having disputes between them settled by a common tribunal appointed by them. Indeed, there may be a question whether or not the legal effect of the pending treaties, if they are ratified and are held constitutional, will not be to establish a judicial union between these three nations, in which case the arbitral tribunal would, according to American doctrine, be legally limited by the principles of the supreme universal law and by the constitution and laws of the

union. As bearing on this question, the provision making the arbitration arrangement permanent, with a reservation of the right of secession, may be important. This provision, as it appears in the proposed treaty with Great Britain, reads (Articles VI and VII):

"This treaty shall supersede the arbitration treaty concluded between the high contracting parties on April 4, 1908. . . . The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as possible, and the treaty shall take effect on the date of the exchange of its ratifications. It shall thereafter remain in force continuously unless and until terminated by twenty-four months' written notice given by either high contracting party to the other."

If the effect of the pending treaties is to establish a judicial union of three nations of which the United States is to be a member, the question arises whether such a union can constitutionally be formed by treaty. It is an act of great importance and solemnity for the United States to enter into a union with foreign nations for judicial purposes. Moreover, the Constitution (Article IV, sec. 3) provides:

"New States may be admitted by the Congress into this Union; but no State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress."

When any change is to be made in the component parts of the Union which exists under the Constitution, or in the composition of the Union, therefore, Congress

must act. Can it be possible that when it is a question of the United States making itself a component part of a Union, of which two great European states are to be the other members, any less authority than the Congress of the United States can decide?

The Constitution also provides (Article I, sec. 8):

"The Congress shall have power . . . to declare war . . . to raise and support armies . . . to provide and maintain a navy . . . to make all laws which shall be necessary for carrying into execution the foregoing powers."

It also provides (Article II, sec. 2):

"The President . . . shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

A treaty is an agreement with a foreign power regarding a particular dispute. The power to delegate to a tribunal the settlement of a dispute presupposes the inability of the President and Senate to make a treaty which shall itself settle the dispute, and a choice by the nation between a settlement of the dispute by war and a settlement by judicial means. It seems as reasonable to hold that the Constitution places the responsibility for making such a choice on the Congress as an incident to the war power, as on the President and Senate as an incident to the treaty-making power. The efficiency of judicial settlement of international disputes depends upon the existence of a public sentiment in favor of such settlement; it can never be made certain that the public sentiment is in favor of judicial settlement either in a particular case involving questions of great public interest or as a general policy, until the House of Representatives, which speaks for the whole

people of the United States, and the President and Senate, have declared in favor of this method of settlement. The doubt, if there be one, whether the right to make this choice belongs to the whole Government or to a part of it, should, it would seem, be resolved in favor of the whole Government; for only by the action of the whole Government can it be certain that in cases where treaty is impossible the public sentiment of the nation is in favor of judicial settlement rather than war. It would be consistent not only with the Constitution, but with the advanced thought of the civilized world, if treaties providing for general arbitration of international disputes, or for the arbitration of particular disputes which are of public interest, should, after having been formulated and ratified by the President and Senate, be finally ratified and sanctioned by an Act of Congress passed after the existence of a public sentiment in favor of the treaty had been ascertained.

It seems to have been the original understanding on the part of the British Government that any arrangement for general arbitration made by Great Britain with the United States would be in the nature of a judicial union or an exercise of the war-and-peace powers, requiring the sanction of Parliament, acting on a special mandate from the people of Great Britain. On March 13, 1911, Sir Edward Grey, Secretary of State for Foreign Affairs, speaking in the House of Commons on a motion to reduce the Army and Navy estimates, referred to the suggestion made by President Taft that the United States should enter into agreements "with some other nations to abide by the adjudication of International Arbitration Courts in every issue which cannot be settled by this nation, no matter what it involves, whether honor, territory, or money" for the purpose of "demonstrating that it is possible

for two nations at least to establish between them the same system which through the process of law has existed between two individuals under government."

(These quotations and that immediately following are from the official Parliamentary Debates. (The Parliamentary Debates, Official Report, 5th Series, vol. 22, pp. 1989–1991.) The words of President Taft quoted by Sir Edward Grey were delivered before the American Society for Judicial Settlement of International Disputes on December 17, 1910. In the official report of the Proceedings of that Society (p. 353), President Taft's words are thus given:

"If now we can negotiate and put through a positive agreement with some great nation to abide the adjudication of an international arbitral court in every issue which cannot be settled by negotiation, no matter what it involves, whether honor, territory, or money, we shall have made a long step forward by demonstrating that it is possible for two nations at least to establish as between them the same system of due process of law that exists between individuals under a government.") In that speech, Sir Edward Grey said:

"These are bold and courageous words. We have no proposal before us, and unless public opinion will rise to the level of discussing a proposal of that kind, not with reference to charges of inconsistency, not with reference to what one nation or the other is going to do by some agreement, but unless they rise to the height of discussing as a great movement in the opinion of the world, it cannot be carried out. But supposing it took place, and two of the greatest nations in the world were to make it clear to the world by agreement such as that, that in no circumstances were they going to war again, I venture to say that the effect on the world at large of the example would be one

which would be bound to have beneficial consequences. . . . Entering into an agreement of that kind there would be great risks entailed. If you agree to refer everything to arbitration as the President of the United States has said, you must be prepared to take certain risks. You must be prepared for some sacrifices of national pride. An agreement of that kind so sweeping as that, if proposed to us, we should be delighted to have such a proposal, but I should feel it was something so momentous and so far-reaching in its possible consequences that it would require not only the signature of both Governments, but the deliberate and deciding sanction of Parliament. That, I believe, would be obtained. I know that to bring about changes of this kind public opinion has to rise to a high plane, higher than it can rise in ordinary times, and higher than some hon. Members opposite, I imagine, think it can ever rise. In ordinary times that may be true, but the times are not ordinary with this expenditure, and they will become still less ordinary as this expenditure increases. . . . I think it is not impossible, though I admit that in a case of such an enormous change progress may be slow, that the public opinion of the world at large may insist, if it is fortunate enough to find leaders who have the courage—the sort of courage which has been shown in the utterances I have quoted in this House—upon finding relief in this direction. Some armies and navies would remain, no doubt, but they would remain then not in rivalry with each other, but as the police of the world. Some hon. Members say we should not live to see the day. I dare say we should not, . . . but I think we shall live to see some progress made."

Any arrangement with Great Britain which requires "the deliberate and deciding sanction of Parliament" registering an ascertained state of British public opinion, must also require the deliberate and deciding sanction of the Congress of the United States, registering an ascertained state of public opinion in this country.

Under the Constitutional Law of France, also, it seems that it may be reasonably held that a treaty establishing a system of arbitration between France and other nations requires the sanction of the French Parliament. The Constitutional Law of France on the Relations of the Public Powers, enacted July 16, 1875, (Article 8) provides:

"The President of the Republic shall negotiate and ratify treaties. He shall give information regarding them to the Chambers as soon as the interests and safety of the State permit.

"Treaties of peace and of commerce, treaties which involve the finances of the State, those relating to the person and property of French citizens in foreign countries, shall be ratified only after having been voted by the two Chambers.

"No cession, exchange or annexation of territory shall take place except by virtue of a law."

A treaty purporting to establish a permanent system of general arbitration with another nation would, it would seem, involve all the subjects mentioned in this law, and would hence require the concurrent action of the President of the French Republic and the two Chambers—that is, in effect, of the French Parliament.

Nor does it seem that there is any less need of deliberate and solemn action by the Legislatures of the contracting parties because the proposed treaties, instead of covering all disputes, cover all "justiciable" disputes, especially when the contracting nations substantially renounce their individual right to place their own construction on the word "justiciable." The principle laid down by Sir Edward Grey seems clearly to apply to the pending treaties, and to require "the deliberate and deciding sanction" of the Legislatures of the nations which enter into the judicial union, acting upon a spe-

cial mandate from the people of each of the nations, after the meaning and effect of the treaties have been fully ascertained and made clear to them.

It is the practice of civilized nations that the question whether a nation shall form a union with other nations shall be settled either by the Legislature or by a Constitutional Convention. It seems clear that no part of our Government, except the Congress, can possibly have this power, as the organ of the nation for this purpose, under the Constitution. If Congress has not this power, such a union could be effected only by amendment of the Constitution.

But, assuming the constitutional power of Congress to bind the nation in a judicial union with other nations, such a course seems to be contrary to American policy, inexpedient and unnecessary.

President Washington's Farewell Address applies to-day with the same force as in 1796. The danger of losing our national heritage of political principle and our national honor and independence by political union or permanent alliance with foreign nations—especially with those whose fundamental ideas are different from our own,—is the same now as it was then. It is true now, as it was then, that "Europe has a set of primary interests which to us have none or a very remote relation." The European states still live unsocially, and their relations are governed by the principle of military strategy known as "the balance of power." Our Fundamental Constitution—the preamble of the Declaration of Independence—is regarded by European statesmen as meaningless. The state is still assumed by European publicists to be the source of all law and hence not subject to law. The individual has no rights against the Parliament, but only such privileges and immunities as the Parliament may grant to him. We

can neither prove or disprove our doctrine; nor can the Europeans prove or disprove theirs. It is a matter of accepting or declining to accept as "self-evident" certain propositions which can neither be proved nor disproved. There must be a conversion of the Europeans to the American doctrine, or a conversion of the Americans to the European doctrine. Between the doctrine of legally limited power and that of legally unlimited power there is no half-way house. A political union for judicial purposes between a nation which regards all governmental power as legally limited and a nation which holds that a part of the government is legally unlimited, is clearly contrary to American policy and has a tendency to imperil and ultimately to overthrow American institutions. It is still clearly our true policy, as it was in Washington's day, "to steer clear of permanent alliances with any portion of the foreign world," and to regard as our friends and permanent allies all the nations of the world; dealing with them, however, on such terms that we shall not sacrifice or imperil the fundamental doctrine of legally limited governmental power for which this nation stands, and which we believe to be essential to peace and justice.

The formation of a judicial union with particular nations is thus seen to be contrary to American policy. It seems clearly also to be inexpedient. Judicial unions of particular nations are likely to convert themselves into "Holy Alliances." They tend to establish a law for the particular union which is inconsistent with the general juridical sentiment of mankind; to become self-righteous; and to attempt to force their ideas of law and political doctrine upon the rest of the world. If the United States, Great Britain and France were to enter into a judicial union, could we reasonably blame any outsider nation which should declare its own "Monroe

Doctrine" in order to protect its legal and political ideas from invasion by the union? We think that the American system deserves to be protected, and we are determined to protect it, not only in our own interests but in the interests of the world at large. But the strength of our position lies in the doctrine which we are protecting and in our wholly defensive attitude. If we form a judicial union with nations which do not hold the political principles which the Monroe Doctrine protects, we may well be charged, by outsider nations, with having abandoned our fundamental principles, our defensive attitude, and the Monroe Doctrine itself. Moreover, we may well be considered as having formed a "Holy Alliance" with these nations to propagate such a faith in legal and political matters as the whole Alliance may decide to be suitable for itself and the rest of the world to hold. Thus a particular union for judicial purposes might lead to jealousy and war, instead of to peace.

A particular union is thus seen to be inexpedient, as well as contrary to American policy. It appears also that it is unnecessary, since there may be a more simple and practicable road to the arbitration or judicial settlement of disputes between nations by legally limited tribunals,—which, it appears, ought to be the goal of our efforts. There is one union or society of which any nation may be a member, without creating any jealousy or imperilling its fundamental legal and political doctrines. This is the union or society of all the nations and peoples of the world, which has already received the name of "the society of nations." Scholars already recognize the existence of this society and are beginning to regard that which has been called "international law" as the law of the society of nations. To make this society a political fact and a part of practical, every-day politics,

nothing is required except that the nations should recognize the existence of this political society and their membership in it. They will then be bound by the customary law of the society, as it is now formulated and as it may hereafter be formulated. For the government of political societies under customary law, courts are the only necessary organs. They ascertain custom, determine its reasonableness, and by their adoption and application of reasonable custom authenticate it as a part of the customary law of the society. Such courts are legally limited by the principles of the supreme universal law, by the existing unwritten constitution and customary law of the society, and by all customary law which, under these limitations, they assist in formulating. The customary law, in the case of the society of nations, is to all intents and purposes a federal law of the society of nations, since it relates only to those matters which are common to all the nations or are beyond the competency of any one. That which we call "international law" is in fact the federal customary law of the society of nations, formulated without a definite legislature and enforced without a definite executive. For the proper development of customary law, courts and tribunals with advisory powers seem likely to be more effective than those whose decisions purport to be enforced by physical or moral compulsion; for customary law must ever rest largely in opinion, and the strength of customary law lies in its power to induce a voluntary obedience. Moreover, nations which hold to the doctrine of legally unlimited governmental power could reasonably accept advisory arbitration by tribunals recognizing themselves as legally limited, since it would not be inconsistent with their doctrine to take advice concerning the settlement of their disputes with other nations.

For the purpose of bringing about the judicial settlement of disputes between nations by legally limited tribunals, any one nation may act alone in its recognition of the society of nations and its membership therein; or several may act simultaneously. Considering the fact that this nation stands for legal limitations upon all governmental power, it seems that it might properly take the lead, leaving the nations which do not accept this doctrine to take such action as they deem proper. This might require that this nation should offer to submit to advisory arbitration all disputes of every kind with any nation, on the understanding that the arbitrators were to regard themselves as legally limited by the principle of universal law that no person is to be deprived of his life, liberty or property by any political society or government without due process of law, and, subject to this law, by all the customary organic and regulative law of the society of nations, as the same is now formulated under the name of "international law" and as it may be formulated by the authentication of reasonable customs—the existence of customs and their reasonableness being determined by having regard to and respect for all existing accepted customs, the principles of all civilized systems of laws, and the precedents under these systems. Such an offer might be made by a joint resolution of both Houses of Congress and a Presidential announcement contained in a Presidential Message, in substantially the same way as the Monroe Doctrine was promulgated. The present Hague Tribunal and the Convention for the Pacific Settlement of International Disputes could be utilized, and thus the necessity of entering into treaties could be avoided, unless it should be considered necessary under the Constitution that the Senate should supervise the "special agreement" in each case.

Such an offer by the United States might well constitute a basis for the consideration by the next Hague Conference of the question of legal limitation of arbitral tribunals; for it seems clear that the success or failure of arbitration of the disputes of nations depends on whether or not the arbitral tribunals act under legal limitations. Only by making the society of nations a fact of practical politics, it would seem, can such legal limitations exist. Leadership by the United States in the movement to recognize and establish the society of nations and to institute a general practice of advisory arbitration under the reasonable customary law of that society, would be consistent with the policy of self-regarding altruism which Washington advised when in his Farewell Address he said:

"Harmony, and a liberal intercourse with all nations, are recommended by policy, humanity, and interest."

If, however, this course should seem presumptuous on the part of this nation, or likely to be interpreted as an attempt to force the American system on the rest of the world, two other courses are open—either to adopt the pending treaties with the clause omitted which attempts to delegate the power of decision regarding justiciability to a Joint High Commission, as the majority of the Senate Committee on Foreign Relations propose,—adding, out of caution, the reservation proposed by the minority of the Committee, withdrawing from arbitration "any question which depends upon or involves the traditional attitude of the United States concerning American questions, or other purely governmental policy"; or to renew the existing treaties until a date some time after the close of the next Hague Conference. The latter course seems the safer one. The pending treaties, even if amended so as to reserve to the President and Senate power to withdraw cases

from arbitration as non-justiciable, leave it uncertain what cases may be withdrawn. Moreover, they may involve this nation indirectly in what will be in fact a judicial union with particular nations. They may also commit us to the European system of legally unlimited governmental power, for they imply that the arbitrators may decide cases on their views of "law or equity" without first applying the fundamental principles securing the rights of the individual and without regard to those great organic national and international policies and dispositions by which the international world is held together, and which form its unwritten Constitution. The existing treaties, on the other hand, leave it open to this nation to withdraw from arbitration any disputes which involve these fundamental principles, or which, if decided in a particular manner, might endanger these organic policies and dispositions. They thus enable us to protect our system, our national policies and the organic policies and dispositions of the whole world.

It seems probable that the question of limitation of arbitral tribunals will be open for discussion at the next Hague Conference, even if this nation should hold to the existing treaties. There seems to be a general desire among the nations that what is called the "codification of international law" shall be considered by the Conference. This will, it would seem, necessarily involve the question of legal limitation of states, governments, and arbitral tribunals. As a result of these discussions, it will be made clearer to us what ought to be our permanent policy in the matter of judicial settlement of international disputes. The great danger to the cause of judicial settlement appears to lie in the adoption by the leading nations of an insufficiently considered policy which will subject them to legally unlimited power and

will result in war rather than in peace, thus bringing judicial settlement into disrepute. The existing treaties have been successful. The only reason urged for changing them is, that they do not go far enough to have an apparent effect in reducing war expenditure, and in preventing the loss of productive energy caused by war and the preparation for war. They are supported by the general public sentiment. Though they have not been ratified by the whole Government of each of the contracting nations, they can, if necessary, be so ratified without delay. The question of their constitutionality, so far as this nation is concerned, is not likely to be raised, and the reservation of broad discretionary power to withdraw cases from arbitration goes far to remove both constitutional objections and objections based on general principles. They afford us a safe ground on which to rest while we are considering what should be the next step. It seems that it will be wiser, before moving from our present secure position, to take time to consider our next step, waiting until we can have the benefit of the discussion and action of the next Hague Conference, so that when next we move, we may do so with confidence and unanimity, in the conviction that we are moving in the right direction.

COOPERATION *VERSUS* COMPULSION IN THE ORGANIZATION OF THE SOCIETY OF NATIONS

COOPERATION *VERSUS* COMPULSION IN THE ORGANIZATION OF THE SOCIETY OF NATIONS

Reprinted from the Report of the Lake Mohonk Conference on International Arbitration. Delivered May 18th, 1916.

DURING the past two years, perhaps as a result of the war, a plan has been seriously advanced and widely supported, for organizing a League of Nations on a compulsive basis; and within the same period, a plan of wider scope has been brought forward with equal seriousness and with a considerable following, for organizing the whole society of nations on a compulsive basis.

One plan is that of the League to Enforce Peace. The other is that of the Fabian Society of London. The latter is a proposal for organizing all the nations compulsively under what is called a "supernational authority." This "supernational authority" is to have conciliative, judicial, legislative, and executive functions and organs, and is to enforce its decisions by means of an international police and by economic force. The plan recognizes and provides for large district unions of nations after the manner of the Pan-American Union—each district union cooperating with the others to uphold the society of nations and the supernational authority. The eight great powers are to occupy a special position in the whole organization, evidently as an Inner League to Enforce Peace.

Such movements, so elaborated and so supported,

challenge our attention and consideration. It is our duty to examine them, and either to support them or to state our reasons for opposing them when suitable opportunity is given. For myself, I wish to say that my objections are not based on any notion or belief that the use of force is not justifiable in any case. The experience of mankind has, I believe, abundantly proved that in some kinds of organization, the use of force is necessary, and therefore justifiable. Whether force ought to be used in a particular political organization depends upon whether it is possible to use it in that political society so as to effect the object of that society. In the society of nations, or in any League of nations, it seems to me that the use of force is impracticable, and therefore unjustifiable. I shall therefore attempt to base my objections on accepted principles of political science, and on considerations of practical politics.

The plan of constitution of the proposed League to Enforce Peace consists of a contracting clause and four articles. By the contracting clause, the United States and some other nations—evidently less than all—are to constitute themselves into a political union, described as a "League," the members binding themselves to the observance of the four articles. No object is stated, no fundamental principles of individual and national right and duty are declared, no constitutional prohibitions designed to safeguard these fundamental principles are to be accepted by the signatory nations, no legal limitations of any kind upon the processes and organs provided for in the four articles are established.

The first article obligates the signatories to use the process of judicial settlement as respects all "justifiable" questions, subject only to the limitations of treaties—that is to say, in conformity with particular or general

agreements—and provides for the institution of an organ, or organs, of adjudication called a "judicial tribunal."

The second article obligates the signatories to use the process of conciliation as respects all other questions arising between them not settled by negotiation, and provides for the institution of an organ, or organs, of conciliation called "a council of conciliation."

The third article obligates the signatories jointly to use forthwith both their economic and military forces against any one of their number that goes to war, or commits acts of hostility, against another of the signatories before any question arising shall be submitted as provided in the foregoing two articles, but fails to institute any organ to determine, direct, and apply the force.

The fourth article provides for the process of formulation and codification of rules of international law, which formulations and codifications, unless some signatory shall signify its dissent within a stated period, shall thereafter govern the decisions of the organ or organs described in the first article as "a judicial tribunal." The fourth article also obligates the signatories to institute an organ or organs of formulation and codification of the rules of international law, described as "conferences."

Such being the provisions of the proposed constitution of the League of Nations to Enforce Peace, let us consider them briefly.

In the first place, it must be recognized that no criticism is made or intended of the first, second, and fourth articles of the constitution taken by themselves. These articles provide for a general treaty binding the signatory nations to use processes and establish organs of adjudication, conciliation, and law-formulation. These

processes and these organs are, as pointed out by Dr. John Bassett Moore, in his learned and inspiring address as the presiding officer of the last Mohonk Conference, the normal processes and organs of the cooperative and non-compulsive form of organization. This Conference incorporated in its platform of last year resolutions advocating the general application of these processes and the general establishment of these organs between nations. The League to Enforce Peace proposes to take the processes and organs which are peculiar to voluntary and cooperative organization and make them compulsive. The normal processes and organs of the compulsive form of organization are, of course, the legislative, the judicial, and the executive. The plan of the League to Enforce Peace is therefore an attempt to confuse two antithetical forms of organization.

The plan assumes that a league of nations could compel any member nation to submission in a manner comparable with that by which a nation compels its citizens and societies to submission. A war waged by a coalition of nations having five hundred millions of population against a nation having a hundred millions would doubtless not be able to effect the submission of the nation. It would, however, mean practically universal war, followed by universal bankruptcy and famine. In proposing a compulsion of nations, therefore, the plan seems to propose an impossibility in fact.

The constitution of the proposed League may be construed as providing that the League shall compel its members to submit to having their disputes with the members submitted to adjudication or conciliation or as providing that the League shall punish or abolish any nation refusing to submit to adjudication or conciliation. If it is to be construed as proposing to compel submission to conciliation, it proposes an impossibility

in the nature of things. Such use of force is negated by the definition of conciliation. The word "conciliation," is the one selected by the English-speaking part of the world to express a wholly voluntary and persuasive process by which a person brings the influence of religious belief, of experience, and of reason to bear upon the minds and consciences of other persons who are involved in a disagreement which is becoming, or has become, a dispute, and which may lead to violence. The sole purpose and end of conciliation is to induce the disagreeing or disputing parties voluntarily to agree. That force may be used in aid of conciliation is doubtless true, but the plan does not so limit the use of force. It provides for conquering a nation and forcing it to submit to the League's will when it has refused to submit to adjudication or conciliation. This is a compulsion placing a nation at the mercy of the other members of the League whenever they, after condemning it as a violator of the League's constitution, succeed in conquering it. Such provisions for conquering and punishing, or perhaps dividing and abolishing nations, are abhorrent to modern ideas.

The plan contains no provision for an executive to wield the force of the union, nor for a permanent legislature to determine how the force is to be used. The force used is to be joint force—that is, joint and several force—not united force. The experience of mankind in the use of the compulsive form of organization warns us of the dangers of the use of any force in any organized society, or union of organized societies, except the united force of the society in aid of the powers which are conferred on it by the members and which are constitutionally and legally limited by a fundamental constitution. When the law and will of the society is constitutionally formulated, declared, and applied by its

legislative, judicial, and executive organs, the executive, when necessary, wields the force of the society so as to make its law effective in determining the actions and relationships of the members in their own and the common interest. An organized society or union wielding force without a definite legislative and executive organ to direct the force in execution of the legally limited judgment and will of the society, is a political anomaly of the kind aptly described by Jefferson as an "entangling alliance." It is an alliance, because it is an imperfect and defective union; it is entangling because it involves the members of the imperfect and defective union in a tangled mass of relationships and activities, for the disentanglement of which force is used without adequate determination, direction, and limitation, and without those arrangements for solving disagreements before they reach the acute stage of dispute, which is essential to the orderly, economical, and efficient use of force.

As illustrating the possibilities of entanglement, it is only necessary to consider some of the questions which each of the signatory nations in the proposed League would have to decide for itself in order that their economic and military forces might be used jointly. What "question" in a given case, is to be "submitted," of all the various questions which are possible to be regarded as the questions in dispute when great nations or great groups of nations stand threatening each other and on the verge of war? What is a "submission" of a dispute to adjudication, or to conciliation? What is an act of hostility? What is economic force? How shall it be used in a given case? What shall happen if both or all the nations between whom questions arise insist that they will not submit their dispute to adjudication or conciliation, and proceed to fight re-

gardless of the rest? Is it to be permitted, when both parties to the dispute violate their obligations as members of the League and engage in war, that the others may be neutral, or must the non-disputants fight both the disputants? Would any member of the League which felt that both belligerents had violated its provisions be able to claim any right or perform any duties as a neutral, if other nations of the League held that only one of the belligerents had violated the constitution of the League?

The proposal that the members of the League shall use joint economic and military force recognizes and legalizes the use of military force to bring into operation the destructive economic forces of cold and hunger. Economic force used to compel submission, if morally justifiable at all, can only be justified when used as humanely as possible by a skillful legislature and executive of a responsible organized society. In times of peace economic force may be so directed as to affect classes of people to the benefit of all. In times of war, however, it can only be used to compel submission, and inevitably injures both combatants and non-combatants. Economic force used in war, or as a substitute for military force in compelling submission, destroys alike infants, children, women, the sick, the aged, as well as the men of fighting age and ability. The horrors of its use far surpass the horrors of war between armed men. The use of economic force to compel submission—whether by encirclement and siege on land, by blockade of commercial ports, by destroying unarmed ships of commerce, by general embargo, by general prohibitive tariff, or by prohibitive regulations designed to effect a boycott—recoils upon those who use it. Not only does such use of economic force generally involve the nation using it in economic loss, but, since it involves

the destruction of the weak, the innocent, and the helpless, it decivilizes the people of the nation using it and sets back civilization generally.

The league, therefore, in order not to be an entangling alliance, and in order not to extend the inhumane and decivilizing use of economic force, must have a permanent legislature and an executive. But if these are added, the plan becomes one for establishing a federal state out of widely separated nations. The failure of the Imperial Federation movement in the British Empire shows that a federal state composed of non-contiguous states or nations is an impossibility.

The proposed constitution of the league makes no reference to the greater part of the internal relationships of the league and none at all to its external relationships. That such a league would arouse suspicion and jealousy on the part of the omitted nations goes without saying. The league, in order to have an opportunity to be internally peaceful, would have to be so completely dominant over all nations outside it that those nations, either separately or in alliance, would never dare to attack it or any member of it. A dominant league would soon bring under its control all the weak and backward nations outside it, and the world would find itself in the hands of an oligarchy of widely separated nations; an oligarchy which would itself ultimately be ruled by the nation or nations controlling the sea.

The proposed constitution of the league, whether it provides for a weak league, a strong league, or a dominating league, is inconsistent with the whole conception of the society of nations and of the law of nations recognized, formulated, and applied by that society, which has been slowly built up by the thought and effort of the world. A league of separated nations

differs in nature from a league of contiguous nations. A league of separated nations must, in order to live, be dominant at sea, and probably also on the land and in the air. A league of contiguous nations forms a district in the whole organization of the earth's surface, and its local self-government is consistent with the local self-government of other district leagues. If the world were divided among several great district leagues or unions, they would tend to establish a supernational authority over all. A league of separated nations, on the other hand, would tend to be the supernational authority. If there were several such leagues, they would tend to fight until one of them became the supernational authority.

Finally, the plan exposes all nations to new and real dangers. It is said by the promoters of the plan that the league is not dangerous to its members or to the nations outside of it, because the members will never be called upon to perform their obligation to go to war, since the mere existence of the league, and the fear of joint action, will keep the peace. The hard experience of many men and women who have entered into dangerous obligations on representations made to them by persons they have trusted, that they would never be required to fulfill their obligations, proves the fallaciousness of this plea.

We conclude, therefore, that the proposed constitution of the League to Enforce Peace is objectionable:

Because it seeks to use the processes and organs which are suitable only for the voluntary and cooperative form of organization and to make them compulsive;

Because it proposes compulsion of great nations by a number of great nations, which is either an impossibility or a plan for universalizing war;

Because it either proposes to submit to possible de-

struction nations adjudged by the League to have violated its constitution and thereby ultimately to establish a world-monopoly, or to compel submission to conciliation, which is impossible in the nature of things;

Because it lacks a permanent legislature and an executive, and thereby provides for an entangling alliance and an indefinite and disorderly extension of economic force, which, however applied, is essentially inhuman, since it operates upon non-combatants as well as combatants;

Because, if a permanent legislature and an executive be added, the plan becomes one for the establishment of a federal state composed of widely separated nations, which experience shows to be impossible;

Because the League must either be weak and subject to external attack, or dominant over all outside nations;

Because the League, being composed of scattered nations, whether it be weak and precarious, or strong and dominant, is inconsistent with the whole conception of the society of nations and the law of nations, and tends to the destruction of international order and law;

Because the League is not, as its advocates would have us believe, a means of producing universal peace without danger to its members, but, if carried into effect, would be a political union of an imperfect and defective kind, involving its members in complicated and highly onerous relationships, and imposing upon each obligations, which it must fulfill at the risk of its destruction by the others.

Are we then driven to the conclusion that there is no hope for a more economical, efficient, and therefore, peaceful, organization of the society of nations except by organizing that society into a federal state, which is clearly beyond the range of practical politics? I believe not. The possibilities of voluntary and cooperative

organization have not yet been exhausted. In the industrial world as at present organized, enormous groups and societies and corporations carry on their operations and settle their disputes and strikes by wholly voluntary and conciliative methods. The success attained in this field should stimulate those who are interested in political organization on a vast scale to explore the possibilities of this new science of cooperative organization. The great industrial groups and societies of the modern industrial world resemble nations in that no compulsion of them by the state is possible, because their power rivals that of the state itself. But experience seems to have shown that not only is compulsion ot those vast societies impossible, but that it is also unnecessary, since the increasing reasonableness of democratically organized societies, under modern conditions of universal education, makes conciliation increasingly possible. It may well be that the voluntary processes and organs which have been found suitable for holding in cooperative union the great industrial groups and societies may prove to be more effective for holding the nations together in peace than the compulsive processes and organs which we use in our federal states.

Moreover the nations of the world are now actually organized as a voluntary and cooperative union under the Convention for the Pacific Settlement of International Disputes. That Convention, as adopted by the First Hague Conference, was accepted by all the nations of the world except three small nations—Costa Rica, Honduras, and Korea, the last named of which has since lost its independence. It was thus, to all intents and purposes, a unanimous and universal compact of all nations. It formed the signatory nations into a union by establishing certain processes for determining

their relationships as members of the union and by instituting certain organs of the union to carry on these processes. It was thus a constitution. By its universal acceptance, the union of all nations became a matter of political fact and practical politics. The union thus constituted was an organized political society with processes and organs of conciliation, arbitration, and law-formulation. The convention, as originally adopted, still holds, although the revisions and amendments made at the Second Conference in 1907 have not yet received unanimous adoption.

The union of nations, thus constituted, was, however, a very imperfect union. The processes were unscientific, and the organs were inadequate. These processes may be made more scientific, and these organs may be made more adequate. To do this would be doing, in a new way and on a broader scale, what our American statesmen did in 1787—it would be the formation of "a more perfect union."

The perfecting of the cooperative union of the nations will require, not only the scientific development and the local extension of the processes of conciliation, adjudication, and law-formulation throughout the union, but also the removal of the obstacles to the cooperative life and action of the nations. The principal obstacles, at the present time, are the external monopolies of nations, and secret agreements. These external monopolies may be abolished by means of universal agreements for the common and equal use by nations of the sea and the air, which are by nature the common property of all nations; by the extension of the areas of federal or cooperative union on the land; and by recognizing the "open door" in colonies, dependencies, and spheres of influence. Secret agreements can, it would seem, only be abolished by the gradual estab-

lishment of the principle that all secret agreements are void for all purposes, as contrary to public policy.

It may thus be possible to make the existing union of nations so effective that economic or military force will not be required. If, however, such force should be found necessary, a basis will have been laid for the establishment of a suitable and legally limited supernational authority to wield the force of the union with skill and efficiency, and such a supernational authority will no doubt in due time be evolved.

The practical course, therefore, is, it would seem, to take as our basis of thought and action the present written constitution of the cooperative union of nations —the Convention for the Pacific Settlement of International Disputes as originally adopted, the one unanimous act which has ever happened among men, so far as appears, since the dawn of history. On that foundation, it may be possible, by taking thought and proceeding with careful steps, gradually to evolve a more and more perfect cooperative union of the nations, which shall secure to them order and law, and permit them to live in peace.

WASHINGTON, D. C., May 15, 1916.

COOPERATIVE UNION OF NATIONS

COOPERATIVE UNION OF NATIONS

Self-interest, not fear; self-aggrandizement of all by utilizing equitably the resources which are properly common to all—that is the fundamental principle or motive upon which cooperative union of nations is already working and may be internationally developed, according to Mr. Snow. Readers of *The World Court Magazine* will recall Mr. Snow's suggestive article on "An International Directorate" last October. He now contributes the following striking study of the possibilities of cooperative union and the functions of the directorate in such a union.

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"It would bind together by means of continuous, friendly, and helpful correspondence, not merely the governments of the nations, but the legislatures and, through them, the peoples. It would be an agency of persuasive influence, formed by the nations, of the nations, and for the nations."—From an address at a dinner in honor of Senator France of Maryland, New York City, May 1920.

DURING the last century, plans for organizing the nations as a union were generally modeled upon the Constitution of the United States, and provided for forming them into a federal state. Of late years, the tendency has been to use the Articles of Confederation as the model, and the proposals made have generally had for their purpose the institution of a confederation or league of nations.

The federal state plan seems to be losing ground. The reason apparently is that no nation is now willing, or is ever likely to be willing, to subject itself, even as respects those matters which are of common concern to all nations, to a federal government, which necessarily acts through a majority of the nations and whose statutes are enforced by a federal army and navy.

Such a majority would be composed of nations all of which would be diverse in race, tradition, character and civilization from the nation affected, and many or most of which would be widely separated from the nation affected and from each other. A majority so constituted would, it is feared, be incapacitated, by the conditions under which it would necessarily act, from making decisions and issuing statutory commands which would be so just and equitable that they could be executed against the members by federal armed forces.

The plan for a confederation or league of nations has widespread support and approval. A confederation or league is, however, open to objection because of the lack of leadership and direction. In lieu of leadership, reliance is placed upon action of the nations in common in each emergency as it arises. By such action in common it is impossible to make adequate provision for preventing friction or avoiding dispute between the members, and all that can be done is to settle disputes after they have arisen. The settlement of disputes is of course desirable, but it is far more desirable to prevent friction from arising or, if that be impossible, to prevent it from taking the acute form of dispute. History shows that a confederation or league either disintegrates or converts itself into a more perfect unity. The plan for a confederation or league of nations can therefore, it would seem, reasonably be supported only as a temporary expedient, and as a half-way house towards a more perfect and ultimate form of union which is planned and foreseen, and which may reasonably be regarded as attainable in the not remote future. As a matter of fact this plan is generally advocated, not as an ultimate solution but as a temporary expedient. It thus becomes material to any argument in favor of

a league of nations, that the ultimate form which the union of nations ought to have should be specified. If, in the course of the study of the form of union which is to supersede the league, a kind of permanent union should be discovered which should be found to be satisfactory to the nations and thus capable of immediate adoption, so much the better. In that case a league of nations would cease to be expedient or desirable.

The experience of societies and corporations for economic and social purposes in forming themselves into unions has shown that there is a kind of union, which may be described as cooperative. In 1914, there were about four hundred international unions of a cooperative and non-political character. This kind of union is plainly capable of political application, but it has as yet been so applied only tentatively and experimentally, and its full potentiality for political purposes has therefore not yet been determined. The most conspicuous example of cooperative union in the political world would seem to be the Pan-American Union, a very useful and successful organization, though yet intentionally undeveloped, out of caution, so that the limit of its full potentiality is yet unknown. Some writers hold—doubtless correctly—that the nations, by entering with practical unanimity into the Hague Convention for the Pacific Settlement of International Disputes, formed themselves, by the necessary implications of that Convention, into a cooperative union, of which the Permanent Court of Arbitration, the Permanent Administrative Council and the International Bureau are the present organs. If this be the legal effect of that Convention,—as it would clearly seem to be,—the nations are now in law united in a cooperative union of an imperfect and inadequate character, but capable of indefinite development.

The fundamental principle or self-evident truth on which cooperative union is based seems to be that normal persons are influenced as respects their action and relationship by self-interest and not by fear; and that the normal motive is the innate desire for self-aggrandizement. A cooperative union thus frankly and openly appeals to self-interest and devotes itself to enabling each unit to attain self-aggrandizement to the utmost extent possible. It holds that self-aggrandizement of any one person or nation is dependent upon the self-aggrandizement of all other persons and nations. Abnormal persons or nations, which through lack of development or disease are incapable of realizing their own real self-interest and of having the desire of reasonable self-aggrandizement, it seeks to restore to normality, using such restraint as may be necessary for the purpose.

A cooperative union of nations would thus have for its object the self-aggrandizement of all nations, and it would attain this object by devising plans, promulgating counsel, and persuading to voluntary action, so as to enable all nations to utilize equitably the resources which are properly common to them all, for universal self-aggrandizement.

It will be objected that the cooperative principle is too abstruse for the average man, and so much at variance with the notions of the average statesman and publicist as not to be capable of application in practical politics. To this it may be answered that even before the war the cooperative principle had made great headway in the world, and that though the war has temporarily divided the world into two groups, yet during the war the progress of the principle within each group has been even more marked. As the principle, if correct, is of universal application, it is reasonable to

hope that, after the war, a universal application may sooner or later be possible.

The organ or agency through which a cooperative society or union directs its effort towards the common object is not strictly a "government," since that word in its accepted and practically universal usage implies power not only to induce voluntary action and relationship towards a common object, but also to compel involuntary action and relationship towards this object. The word "directorate" seems most appropriate, inasmuch as the organ by which our modern cooperative business, charitable, social and scientific associations and corporations act, is generally called a board of directors, or a directorate. The French use of the word *directoire* to describe the post-revolutionary French government, and the European use of the word "directory" to describe the monarchial alliance to govern the world which arose out of the Congress of Vienna, militate against the use of that word. But "directorate" in its modern sense has taken on a meaning quite distinct from "directory," and the verb "to direct" seems from its derivation to contain the idea of personal action, setting the diverse actions of other persons in the right course, by counsel and persuasion on the one part and consent on the other.

The directorate might have any form which the nations should agree upon, but a directorate of the typical form would seem to be exceedingly simple—consisting of a general representative committee and a small appointed managing or executive committee. Most cooperative societies and cooperative unions of societies seem to find this form the most economical and efficient. The function of the directorate of a cooperative union of nations would be to give correct counsel to the nations. The appointed managing committee

would be best adapted for giving counsel in most cases; but in order that it might give correct counsel, the experience of cooperative unions generally shows that it would be necessary that there should be a superintending representative committee to revise the counsel of the appointed managing committee in cases where such revision should appear to be needful. The counsel given would result in acts by common consent of the nations, which would have a legislative, judicial, and executive character; but the directorate would not itself legislate or execute, though it might adjudicate or arbitrate in cases which were proper for adjudication and which might be submitted to it for adjudication or arbitration. The counsel given by the directorate, the adjudications made by it, and the arbitral awards announced by it, when acquiesced in generally by the nations, would tend to establish accepted rules of international action, which would become a part of international law. Voluntary acceptance and carrying out of the counsel, judgment or award of the directorate by the nation or nations affected would take place in lieu of an execution in the ordinary sense. If nations saw fit, they could without interfering with the directorate, hold general conferences for promulgating rules of future action and relationship, which, when duly accepted, would become rules of international law.

An international directorate, in order to exercise real political force, would need to have the power to counsel and persuade the nations and to induce them voluntarily to conform to the counsel given; and in addition it would need to have all incidental powers necessary to make the principal grant of power effective. The nations would thus delegate to the international directorate the power to investigate facts, to inquire of persons and receive correct information, to send its investigating

agents into any part of the world, to have its diplomatic agents in each nation, to formulate and promulgate counsel upon the facts ascertained, and to publish reasoned statements in support of its action in order to bring to its aid the moral pressure of public opinion.

Jurisdiction over all matters of common interest to all nations or beyond the competency of any one or several of them, might be conferred on an international directorate; but such a plenary jurisdiction is not essential, and the nations might reserve to themselves any of the powers within this category which they saw fit not to delegate. The matter which is of the greatest common interest to all nations is international commerce. Just regulation in this respect is absolutely essential to international cooperation. In exercising jurisdiction over questions arising out of international commerce, it would be necessary for the directorate to counsel and persuade the nations so as to bring about a just and equitable use of the highways of international trade,—the high seas, the international canals, rivers and railroads; so as to bring about a just and equitable international intercourse and migration; and so as to induce justice and equity in the employment of the instruments of international trade and finance.

The most difficult and delicate matter regarding which an international directorate would have to exercise its conciliative jurisdiction would be the superintending of territorial adjustments between nations. This is a subject which is of the greatest interest to all nations, and up to the present time no way has been found to regulate it except through war or the threat of war. In order to exercise successfully a conciliative jurisdiction over this subject, it would be necessary for the directorate to apply an equitable principle accepted by the nations. Otherwise its counsel would be mere

opportunistic intermeddling, and would be likely to produce rather than to prevent war. The principle applicable in the determination of all territorial adjustments between nations would seem to be that the units of a union of nations, being theoretically equal in the union, ought to be as nearly as possible equal in size and strength. It is of course not impossible that large and strong units of territory and population should live in cooperative union with small and weak ones; but such a situation is dangerous to international peace and order, and the more nearly the units can be equilibrated by being made equal in size and strength, the more harmonious and perfect will their union be. The principle that units of a union ought to be actually as well as theoretically equal is, however, not peculiar to cooperative unions. It is equally applicable to federal states and even to confederations, as the experience of the United States shows. The Articles of Confederation nearly failed of adoption and the Confederation was threatened with dissolution, because of the inequality between the states arising from the fact that some of them claimed vast portions of the Northwest Territory. The other states realized that, if these states were allowed to expand into the Northwest Territory, the inequality in size and strength between these enormous states and themselves would in practice make the theoretical equality of all the states nugatory, and that the smaller states would lose their independence and become in fact dependencies of the great states. The smaller states insisted that it was essential to the proposed union that the claims of the states to the Northwest Territory should be ceded to the Union, and that the Union should lay out the ceded territory into new states of the average size of the original states, which should as soon as possible be admitted into the Union.

Thus all the units of the Union, present and future, would be approximately equal in fact.

The union of all nations,—which, though very imperfect, really exists at the present time,—is in a position similar to that of the United States during the period from 1779 to 1783, when the problem of equilibrating the units of the Union was being considered. The existing union of nations is composed of great and small nations. Some of the nations claim as dependencies extensive areas of the earth's surface outside their domestic realms. The smaller nations, and those of the larger nations which are without dependencies, are beginning to realize that equilibration of the units is in the long run essential to the full effectiveness and power of a cooperative union of the nations; and, while it is recognized that the circumstances do not permit of a drastic and instantaneous equilibration, it is felt that in the course of time and as circumstances permit, measures must be taken by mutual and friendly agreement for transferring to the union of nations those claims of jurisdiction over external regions now asserted by individual nations, in order that the union may lay out these external regions into new nations of the average size and strength of the existing nations with the understanding on the part of all concerned that these new nations shall be admitted into the union of nations when duly qualified. Moreover, it is being realized that, inasmuch as nations, like human beings, are born, grow and decay, there must be provision made for new equilibrations of the units by the union of nations whenever new nations are formed through amicable division of great nations or through junction of small nations or parts of nations. The United States in its constitution wisely made provision for such a continuous equilibration by conferring upon its Congress

not only the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, but also the power to regulate, by giving or denying its approval, the formation of all proposed new states by voluntary division of states or by the voluntary junction of states or parts of states, and to admit into the Union these new states, whether formed out of dependencies of the Union or out of the states of the Union, whenever it should consider them qualified for admission.

In order to effect such an equilibration of the units of the union of nations, it would be necessary to delegate to the international directorate jurisdiction to counsel the nations in this respect and gradually to induce a voluntary equilibration by its conciliative action.

A cooperative union, having at its head a directorate exercising by conciliative means a moral influence over the complicated common affairs of the nations, would not be a weak union. The power to counsel and persuade and to induce adoption of its counsel by publication designed to influence public sentiment in its favor, delegated by all nations to a directing committee, would be a tremendous and dangerous power. It would have to be most carefully safeguarded by constitutional limitations and prohibitions. The nations would have to preserve to the fullest extent their power of self-determination, and would need to scrutinize and criticize the action of the international directorate with perfect freedom before adopting its counsel. The sole ground for adopting its counsel or yielding to its persuasion would be the conviction of the conscience of each nation of the justness of the counsel given. Every counsel of the international directorate adopted by the nations through conscientious conviction of its justness would strengthen the moral influence of the directorate

and heighten the presumption in favor of the justness of its future action. It is to be expected that, as in the case of the Supreme Court of the United States, popular sentiment in favor of the international directorate would steadily increase as the nations voluntarily adopted its counsel. As popular confidence increased, its counsel and persuasion would have a moral force so great that no nation could refuse to follow the counsel given except by convincing the directorate itself and the public generally that the counsel was erroneous and unjust.

Cooperative union is applicable to any minor group of nations as well as to the great group composed of all nations. Several contiguous small nations which are too heterogeneous to unite as a federal state may therefore sometimes find it possible to unite themselves in a cooperative union. By means of such minor cooperative unions, it may perhaps be possible to solve a perplexing problem which for centuries has disturbed the society of nations—that is, the problem of bringing about a real cooperation between the nations which are large and powerful and their neighbor-nations which are small and weak. This is of course a problem of equilibration. Europe particularly has been disturbed by this lack of equilibration. The European concert has always been ineffective as a union because of the close juxtaposition of large and powerful nations with others which are in comparison small and weak. The large and powerful nations will of course never consent to division, so that the only possible way of equilibrating the units of the Concert is through junction of the smaller nations so as to form new units comparable in size and strength with the larger. The small nations are too diverse in language, tradition and racial traits to unite themselves in groups as federal states, though all have a general character-

istic of Europeanization. The diversity which exists may perhaps be found to be no obstacle to the cooperative union of groups of these smaller nations; each group having a directorate instituted by itself. Such unions would not operate to diminish the independence of the nations which were members of them, any more than a cooperative union of all nations under a directorate would diminish the independence of all nations. On the contrary, the smaller nations would, as members of a minor cooperative union, in all probability have a more real independence than they now have. The groups of small nations lying between the large nations —the groups of so-called buffer-nations—have a common interest to unite cooperatively for the preservation of their independence against their powerful neighbors, and for the purpose of obtaining a real voice in the deliberations of the Concert, through their directorates. By the formation of the groups of buffer-nations into cooperative unions so that each of these unions would approximate in size and strength the average of the great nations, the European Concert might perhaps be equilibrated and might itself become an effective cooperative union. The same problem of small and large nations exists in all parts of the world. If the plan suggested should succeed in the European Concert, it would doubtless be applied universally.

Viewing the nations as together constituting an imperfect union at the present time,—as is doubtless the fact,—all war is now in a sense civil war. If the nations were to recognize themselves as united in a cooperative union, all war would unquestionably be civil war, since war could occur only between members of the union. A cooperative union such as is above outlined, would doubtless tend to diminish civil war, but it would not wholly prevent it. Therefore, in order that a plan of

cooperative union may be practicable, it must be supplemented by adequate provision for dealing with civil war; so that the union, which is theoretically indissoluble, may not, as the result of civil war, be in fact dissolved. But it clearly will not do to confer the power to deal with civil war upon the international directorate: for the possession of such power would necessitate its wielding armies and navies and would convert its counsel and persuasion into command and threat, thus depriving it of moral influence. The power to deal with civil war would have to be delegated to an international agency other than the directorate. This international agency might and doubtless ought to be called into existence and operation by the international directorate, in case of emergency, to preserve the cooperative union. It would be wholly consistent with the functions of the international directorate if it were to be authorized, upon the outbreak or threat of hostilities between nations, to summon a war-conference of all nations, or of all nations specially interested, or of all the non-belligerent nations, to meet at a time and place appointed by it, and to continue during the emergency, having power to concert measures for the preservation of the union by settling or suppressing the civil war. The proceedings of such a war-conference should, it would seem, be judicial in character; the object being to settle the dispute, and on failure of such settlement to adjudge between the belligerents so as to determine which of them ought on the whole to be regarded as the violator of the cooperative principle. The expectation would be that the non-belligerent nations would, upon such adjudication, side with the belligerent which was adjudged to have maintained the cooperative principle in the dispute, and would cooperate with it in enforcing the submission of its adversary to the coop-

erative régime. If after the adjudication, there should be a nearly equal division of the sympathy of the non-belligerents, and the nations should form themselves into two nearly equal groups of belligerents, the civil war would be long, bloody and devastating. Therefore, every provision should be made for enabling the non-belligerents, in a body, to side fairly, openly, justly and unanimously, after due investigation, consideration and judgment, with that one of the belligerents which was on the side of the union in the dispute; thus making hopeless the military position of the one adjudged rebellious and stifling the civil war in its inception.

After the present great war is ended, a time is certain to arrive for considering the problem of international reorganization and reconstruction. The question will be, whether to maintain and perfect the existing co-operative union of the nations, or to change it into a universal federal state or into a universal confederation or league of nations. The first of these courses seems most expedient. This would necessitate a gradual development of the existing cooperative union by a long series of international conferences, each endeavoring to remove obstacles to international cooperation and to provide more and more effective organs and processes for directing the nations towards the observance of the cooperative principle. Through such a continuous development, cooperative union of the nations might be found adequate to produce the nearest approximation to international justice, order and peace of which the human race is capable.

NEW NATIONAL PROCESSES AND ORGANS

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THE situation which arises from the proposal that the United States shall adopt the instrument framed by the Paris Peace Conference and called by it "the Covenant of the League of Nations," is unprecedented in the history of the nation. It is, indeed, a situation which is likely to arise only once in the life of an independent state. The question is whether the United States shall enter into a union with other states, under an instrument which, though in form a treaty, is in fact a written constitution, ceding to the union a portion of its independence in consideration of a similar cession by each of the other states; the union having as its professed object "to promote international cooperation and to achieve international peace and security." If the United States decides to enter the League, it will, by the cession of the necessary part of the nation's independence, change its status from that of an independent state holding relations with other states solely under the law of nations, to that of a member state of a union, subordinate to the union, and whose relations to the other states and to the union are governed by the constitution of the union.

The question arises: By what processes and through what organs shall the United States act in making its decision upon the proposal to enter this union and in

thus determining whether to change its status? It is held by many—indeed, it seems to be generally taken for granted—that the proper process is that of treaty, pure and simple; and that, therefore, this great decision may be made, in behalf of the people of the United States, by the President and Senate, the latter acting by two-thirds vote. Others hold that, inasmuch as the adoption of the Covenant will change the character of our government, the treaty-making power is inadequate, and that the change can be made only by amending the Constitution of the United States in the manner provided by the Constitution. Still others insist that as the change of government proposed does not involve a change in any specific part of the Constitution but will amount to superseding the whole Constitution in certain respects by placing over it a super-constitution, the process for amending the Constitution is not applicable; and that inasmuch as all powers not expressly granted are, by the tenth amendment, reserved to the states respectively and to the people, the proper process is that of a constitutional convention of the states and people of the United States.

That the treaty-making process, pure and simple, is not a proper one in the present case would seem to be clear. The Constitution itself distinguishes between treaties of union and treaties of the ordinary kind by giving to Congress the power to admit new states into the Union. Evidently the admission of a state into an existing union is possible only by treaty between the union and the state, whatever may be the form of the action of the parties. This power to admit new states undoubtedly includes the power to incorporate annexed regions into the union. The reason why this power to change the character of the government by taking new elements of territory and population into

its domestic body was vested in Congress, was explained by Justice (now Chief Justice) White in the *Insular Cases*. In the case of Downes *v.* Bidwell (182 U. S. 287, 312, 313, 319), he said:

In view of the rule of construction . . . that all powers conferred by the Constitution must be interpreted with reference to the nature of the government and be construed in harmony with related provisions of the Constitution, it seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress. . . . If the treaty-making power can absolutely, without the consent of Congress, incorporate territory . . . it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States, speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of our government overthrown. . . .

When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been even mooted.

In the same case, Mr. Justice Gray said (page 346):

"So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty make the conquered territory domestic territory in the sense of the revenue laws.

The treaty-making power was thus described by William Rawle, in his work, *A View of the Constitution of the United States* (ed. 1829, page 65):

"(A treaty) is a compact entered into with a foreign power, and it extends to all those matters which are generally the subjects of compact between independent nations. Such subjects are peace, alliance, commerce, neutrality, and others of a similar nature."

This conception of the treaty power as a power incident to sovereignty, to be exercised within the scope and in the manner established by the law of nations and by the practice of the leading independent states, runs through the literature of the public law which was in existence at the time the Constitution was adopted. By the law and practice of nations, treaties in general between independent states were made by the king or chief executive in council. Treaties of union, however, were not regarded as treaties but as constitutions of government and were made by parliaments in which all the estates of the realms of the uniting states were represented. This course was pursued in the case of the treaty of union between England and Scotland in 1707, generally called the "Act of Union," by which the two states became one under the name of Great Britain. The parliaments of each of the states authorized by identical statute the appointment of commissioners "to treat and consult" concerning a union and to make a "report" to the respective parliaments, and the parliaments by identical statute accepted and adopted their joint report called "Articles of Union." In the articles, the whole transaction is called a "treaty of union."

This view of the treaty-making power, as a power to make all such agreements with independent states as

are usually made between independent states, but not to make any voluntary agreement with other states for a cession of independence, whether mutual or otherwise, or to change in any way the character of the government, is plainly that held by the Supreme Court of the United States. That Court, speaking by Justice Field, in the case of Geofroy *v.* Riggs (133 U. S. 258, 266, 267), said:

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations is clear. . . . The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itself and that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

It seems clear, therefore, that the Covenant of the League of Nations, which is a super-constitution of a super-unity of which the United States is to be a member, cannot be adopted by the treaty-making process alone, since the treaty-making power does not extend so far as "to authorize a change in the character of the government." Any act which changes the character of the government is evidently an act done in the exercise of the constitution-making power, whether it has the form of a treaty, a law or an executive order.

The real question is: By what process shall the United States enter into a treaty of union having the effect to supersede in part the Constitution of the United States? This is the opposite case from a treaty of union for admitting into the union a new state or for incorporating annexed territory into the domestic body. A treaty of that sort is a treaty of union for expanding the national strength and influence; a treaty whereby the United States is itself admitted to a union, is a treaty for contracting the national powers and has a tendency to weaken the national strength and influence.

Congress is declared to have power as respects treaties for the purpose of expansion, because, as Chief Justice White has said, it represents the interests of the people of the United States, all of whom are vitally concerned in having the domestic body of the nation kept homogeneous and Americanized. It seems necessarily to follow, *a fortiori*, that Congress, as guardian of these vital interests, must have power as respects treaties for the purpose of contracting the national powers and placing the population in an intimate permanent union and relationship with peoples having standards and ideals different from and possibly destructive of those of the American people.

It seems far more harmonious with the general plan of the Constitution to hold that the Constitution by necessary implication intrusts to Congress this preservative function, as the guardian of all the people, of determining whether the United States shall partially extinguish itself in a union than to hold that the constitutional process for determining such a question is that of constitutional amendment or of constitutional revision through a general constitutional convention. By the practice of nations, the legislature of each

independent state is regarded as the guardian of all the people in cases where a change in the external relations of the state is proposed, which, if carried into effect, will make a difference in its domestic constitution or diminish its independence, or which is calculated to affect adversely the standards and the ideals to which its people have attained.

Congress undoubtedly may and should utilize the treaty-making process as a part of the process by which it acts as the guardian of the nation's interests. This might be accomplished by Congress providing in the act or resolution determining its procedure that in case the adoption of the Covenant should be approved by Congress, the Covenant should then go to the Senate, which should act upon the Covenant as a treaty, determining the question of its ratification by two-thirds vote.

It would seem clear that Congress, in thus exercising this extraordinary power of acting as the guardian of the interests of all the people in determining whether it is advisable for the United States to enter into a union with foreign states, is not obliged to sit, or to proceed, in the manner which the Constitution establishes for it when it is exercising its strictly legislative powers. If this interpretation is correct, it would follow that Congress, in the act or resolution determining its procedure in this extraordinary case, might provide that the two Houses should sit in joint session and deliberate by states, the senators and congressmen from each state constituting the state delegation and each state delegation having one vote. It might also be provided that the question whether the Covenant should be approved by Congress should be determined in the affirmative only by the affirmative vote of three-fourths of the states, cast by the state delegations in

the manner mentioned. The principle established by the Constitution that the assent of three-fourths of the states is necessary for amending the Constitution, would thus be preserved. If Congress should thus decide that it was advisable for the United States to enter into the Covenant, the Senate would then proceed to deliberate upon the ratification of the Covenant as a treaty, and if it should ratify the treaty by a two-thirds vote, there would be every probability that the union proposed by the Covenant is worthy the adherence of the United States.

It is not derogatory to the Senate that a special procedure of the kind suggested should be adopted, according to which the legislative power and the treaty-making power would act jointly. The question whether independent states shall voluntarily yield a portion of their independence in order to enter a union, is of too high and solemn a character to be decided by a single branch of the government of a state. The legislature and the executive must together perform the great duty and take the great responsibility. It is for this reason that the Covenant will be submitted for adoption to the parliaments of the other states which are to be the members of the League.

The question of the right of Congress to participate in determining whether the United States shall enter the League, is not a question of the right of the House of Representatives to act in the making of treaties, though the modern tendency is strongly in the direction of allowing the popular branch of the legislature to participate in the making of all important treaties. It is one thing to hold that Congress, as guardian of the interests of all the people, has the right and duty, under the law of nations and the Constitution, to participate with the ordinary treaty-making organs of the United

States in determining whether the United States shall adopt a treaty having the nature of a super-constitution, which, if adopted, will change the character of our government by converting what have been the foreign relations of the United States into external domestic relations. It is a wholly different thing to hold that the House of Representatives has the right under the Constitution to participate in the making of all treaties of the ordinary kind or even in those of great economic or political importance.

The reasons why the power to make ordinary treaties was conferred on the President and Senate and not on Congress, are thus stated by William Rawle in his book above cited, *A View of the Constitution of the United States of America* (ed. 1829, page 65). Speaking of the alternatives which presented themselves to the Constitutional Convention as respects the branch or branches of the government which should be the depositary of the ordinary treaty-making power, he said that the choice was between vesting this power "in Congress generally, in the two Houses exclusive of the President, in the President conjointly with them or one of them, or in the President alone."

He thus states the reasons which determined the choice in favor of the President and Senate (pages 65, 66):

> The formation of a treaty often requires secrecy and dispatch, neither of which could be found in the first or second mode, and a contrary plan would be inconsistent with the usages of most nations. It remained then either to vest it in the President singly, or to unite one of the other bodies with him. The latter was obviously preferable; and all that remained was to select the one whose conformation appeared most congenial to the task. The Senate is a smaller body, and therefore, whenever celerity was neces-

sary, the most likely to promote it. It was a permanent body; its members, elected for a longer time, were most likely to be conversant in the great political interests which would be agitated, and perhaps it was supposed that, as representatives in one point of view rather of the states than of the people, a federative quality appertained to them not wholly unconnected with the nature of a foreign compact.

The reasons stated by Rawle are those which have always been understood to have influenced the Constitutional Convention in vesting the treaty-making power in the President and Senate. These reasons were no doubt excellent at the time (though now steadily growing less and less cogent) and fully justified the Constitutional Convention in making the decision which it did concerning the depositary of the power to make ordinary treaties. But these reasons did not have in 1787, and have not now, any application to that extraordinary treaty-making and constitution-making power which is exercised when an independent state enters into a treaty of union. In this extraordinary case, there is no need for either secrecy or dispatch. The need is for publicity and for slow and calm deliberation. There is no reason to suppose that the Senate will be more "conversant in the political interests" involved than the whole Congress of the United States. Such a treaty is not entered into primarily by the states of the Union, but by the people of the United States primarily and by the states incidentally, and the Congress of the United States is, by the law of nations and the Constitution, the guardian of the vital and fundamental interests and rights of the people of the United States when these great interests are affected by a constitutional document having the form of a treaty, which is proposed to the United States for its adoption.

The effect of the proposed Covenant will be, as has been above shown, to change our relations with all the states which shall be members of the League from foreign relations into external domestic relations. If this be its true effect, the fact will be that, in case the United States shall decide to enter the League, it will find itself without proper organs to enable it to maintain its rights and to fulfil its duties under the League unless it shall previously have instituted such organs. The State Department is organized to deal with foreign relations; the others to deal with internal relations. It is not generally realized that we have always had some external domestic relations. We have always had external domestic territories which were incorporated into the Union; and by the Spanish War we acquired insular countries which are still in subordinate and dependent union with the United States. Our relations with some of these subordinately united countries are in charge of the War Department; our relations with others of them are in charge of the Interior and Navy Departments. The use of these departments as organs of the government for handling these kinds of external domestic relations serves for the present in view of the powerlessness of these subordinately united regions; but such use of the existing departments will not be possible when the vast volume of external domestic relations which will arise from the moment when the League comes into operation, and which will daily grow in extent and insistency, is poured upon the United States. In order to meet this new situation successfully, it will be necessary to be prepared in advance with suitable organs of government, under penalty of the vast loss which is certain to be caused to any nation in every case in which it permits itself to be unprepared to meet a great emergency.

A question which the United States must face and at once settle, if it decides to enter the League, therefore, is: What kind of an organ is necessary to handle successfully the new external domestic relations of the United States with the other states of the League? The answer would seem to be that there must be a new department of the government to deal with these relations. On account of the mixed character of these relations, it seems that the new organ or department should be composed of the heads of those existing departments which deal with our foreign relations and with such of our domestic relations as have an international aspect. The action taken by Congress during the war in establishing the Council of National Defence, would seem to furnish a precedent in instituting the new organ. When the United States entered into association with the powers of the European Entente, to prosecute the war against the Central Powers, its relations with the Entente Powers became, for the period of the war, assimilated to external domestic relations rather than to foreign relations. In order to prosecute the war successfully, there had to be both national concentration and international cooperation. To meet the situation arising from the existence of these new relations, there was established by act of Congress (Army Appropriation Act, approved August 29, 1916, Sec. 2, U. S. Statutes at Large, Vol. 39, page 619, 649, 650) a Council of National Defence which was virtually a department of the government, but was of a composite character. The function of the new department was declared to be "the coordination of industries and resources for the general welfare." It was provided that there should be two parts of the new organ, an upper and a lower body. The upper body, or Council of National Defence proper, was to consist of the Secre-

tary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce and the Secretary of Labor. The lower body was called the "advisory commission." The act provided that it was to be composed of not more than seven persons, nominated by the Council and appointed by the President, and that each of these persons should "have special knowledge of some industry, public utility, or the development of some natural resource, or be otherwise specially qualified, in the opinion of the Council, for the performance of the duties" of the department. Provision was also made for the appointment of expert sub-commissions and of individuals as expert investigators. The duties of the Council, as specified in the act, were, as follows:

To supervise and direct investigations and make recommendations to the President and the heads of executive departments as to the location of railroads with reference to the frontier of the United States, so as to render possible expeditious concentration of troops and supplies to points of defence; the coordination of military, industrial and commercial purposes in the location of extensive highways and branch lines of railroad; the utilization of waterways; the mobilization of military and naval resources for defence; the increase of domestic production of articles and materials essential to the support of armies and of the people during the interruption of foreign commerce; the development of sea-going transportation; data as to amounts, location, method and means of production, and availability of military supplies; the giving of information to producers and manufacturers as to the class of supplies needed by the military and other services of the Government, the requirements relating thereto, and the creation of relations which will render possible in time of need the immediate concentration and utilization of the resources of the Nation.

The reason why this statute was adopted and the new organ or department instituted was that it had been found by experience that the external domestic relations of the United States with its associates during the war could be handled successfully only by a new department of the government adapted to bring about the requisite national concentration and international cooperation. In order to cooperate in a military association with other states, the United States found it necessary to visualize itself and to act, as a unit of a union, for producing and placing in the field an army and navy provided with adequate food, shelter and munitions of war, so long as the war should last.

Peaceful cooperation with other states will also require the United States to visualize itself and to act permanently, as a unit of a union for producing and placing in the field an army of organizers and workers provided with adequate food, shelter, and the appurtenances of civilization adapted to the pursuit of happiness, for utilizing the materials and forces of nature for human benefit and equitably distributing the product among the states, peoples and individuals of the world. In order to deal successfully with these new and vast external domestic relations which will arise under a union which, like the one proposed, is "to promote international cooperation and to achieve international peace and security," it will be necessary, it would seem, to institute by act of Congress, a new organ or department of the government, based on the principles of the Council of National Defence. The new department might perhaps be called "The National Council of International Cooperation." It might be composed of the Secretary of State, as chairman, and the Secretary of the Interior, the Secretary of the Treasury, the Secretary of Agriculture, the Secretary

of Commerce and the Secretary of Labor. The same provision for the appointment of the expert advisory commission and of sub-commissions and expert advisers and investigators should undoubtedly be made. The function of the new department would be to investigate and inform itself concerning all matters falling within the jurisdiction of the League and to advise the President and Congress concerning any of these matters regarding which the United States might be called upon to make a decision.

The underlying principle upon which to base the action of the United States, in establishing such a new department would be that cooperative life is an art which can be acquired only by study and experience. It is a fact of general knowledge that only persons and nations of high attainments in intelligence and conscientiousness can appreciate the reasons and motives of enlightened self-interest which form the basis of the cooperative philosophy and actually do what cooperation requires. The units of a cooperative society must all be equally well-informed, intelligent and conscientious. International cooperation is impossible except by intelligent and conscientious nations, each of which has its own organ of investigation and judgment dealing with the affairs of the world in all their phases and acting as adviser to its executive and its legislature.

The institution of such a department as above outlined, contemporaneously with the entry of the United States into any super-union, is dictated not merely by principle. It is enjoined upon us also by considerations of prudence. The proposed Covenant, or any other similar super-constitution, if adopted, will establish a body in the world which, even though given only advisory powers, will exercise a great influence. Experience proves that such an influence will tend to become

actual political power. One has only to remember the influence and power which the Roman Papacy has had and still has in the affairs of the world, and that which great newspapers, like the *London Times* of a half-century ago, have exercised in international politics, to realize that advisory power in a person or personality of acknowledged leadership, especially if accompanied with the power of investigation and publication, must be classed, in its actual effect, as real political power. Against even the advisory action of a body recognized as having international leadership, each nation must be prepared. Each nation must have knowledge of world affairs equal to that of the body sitting at Geneva, or the advice of Geneva will be in effect the command of a superior to an inferior. The United States, in particular, must be prepared for the new emergency; for, if it is not intellectually prepared to meet with facts and arguments the advice emanating from Geneva, its geographical location may lead to political situations in which the body sitting at Geneva, voicing the sentiment of Europe, or of Europe and Asia, may succeed in giving advice to the United States or to America which will in fact be a command. Against such contingencies, provision should, it seems, be made at the instant the United States decides to enter into the League, if it does so decide. To delay the institution of the new department or organ would tend to involve the nation in a maze of complications caused by the attempt of the existing departments to deal with the new relations. It seems clear, therefore, that the question of the adoption of the Covenant and of the institution of the new department should be considered and decided together so that the moment the League begins to operate, at that moment the new department of the United States may begin also to operate. The prin-

ciple that "eternal vigilance is the price of liberty" evidently applies to the new situation presented by the proposal to enter the League, in all its phases, present and future.

THE MANDATARY SYSTEM UNDER THE COVENANT OF THE LEAGUE OF NATIONS

THE MANDATARY SYSTEM UNDER THE COVENANT OF THE LEAGUE OF NATIONS

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THE proposed Covenant of the League of Nations declares in its preamble that the object of the signatory powers, in uniting themselves as a League, is "to promote international cooperation and to achieve international peace and security." This universal object can only be accomplished by the League exercising such a moral influence over the civilized states external to it and such an advisory or actual control over all the backward peoples of the world, or at least over such of them as may, by common consent of the members of the League, be placed under its tutelage, as will bring about a universal cooperative relationship between all states and peoples.

The Covenant, therefore, properly makes provision for these two classes of external relations of the League. In Article XVII and Article I arrangements are made for settlement of disputes between the League and its members and external civilized states and for admitting such states into the League. In Article XXII and Article I arrangements are made for the administration by the League of such regions inhabited by backward peoples as may be ceded to it by the members of the League having claims to the title and sovereignty of

the regions, and for admitting to membership in the League any backward people which shall have attained the position of "a self-governing colony" of the League and be otherwise qualified for membership.

As respects those regions which are at the present time colonies, protectorates or dependencies of any one of the civilized states, whether the state is a member of the League or not, the Covenant is silent except that Article I makes eligible for membership in the League a "self-governing dominion or colony" of any civilized state which is otherwise qualified.

It is the provisions of Article XXII relating to the administration by the League of regions inhabited by backward peoples and ceded to it by the member states, that are to be considered under the title "The Mandatary System." This name arises from the fact that under the system established by this Article, a member state participating in the tutelage by the League of the backward regions ceded to it is required to act as a mandatary on behalf of the League.

The paragraphs of Article XXII which establish the general principles of this new system and determine the original territories to which it shall be applied, are as follows:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in the Covenant.
>
> The best method of giving practical effect to this principle is, that the tutelage of such peoples should be entrusted

to advanced nations who by reason of their resources, their experience, or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as mandataries on behalf of the League. . . .

In every case of mandate, the mandatary shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control or administration to be exercised by the mandatary shall, if not previously agreed upon by the members of the League, be explicitly defined in each case by the Council.

A permanent commission shall be constituted to receive and examine the annual reports of the mandataries and to advise the Council on all matters relating to the observance of the mandates.

It is noticeable that though the title and sovereignty of the regions conquered by the allied and associated powers in the late war is assumed by the language of the provisions quoted to be in the League, there is no formal cession or conveyance to the League of the claims of the states to these regions. The reason for the absence of formal words of cession seems to be this: These regions, though in fact each of them was conquered by some one or a few of the allied and associated powers, are, nevertheless, in contemplation of the law of nations, under the terms of the alliance and association, the joint conquest of all; and the military occupation of any of these regions, though in fact established and maintained by one or a few of these powers, inures in law to the benefit of all and confers no individual sovereignty upon the state or states which actually made the conquest or which maintain the military occupation. The sovereignty of the former sovereigns of these territories has, as the Article says,

ceased, and the sovereignty of these regions is in the allied and associated powers collectively. When, therefore, they unite themselves into a League, the League is regarded by them as succeeding to their collective sovereignty by operation of law and by their consent, so that no formal cession or quit-claim is necessary, and a mere recognition of the passing of their collective title to the League is treated as sufficient.

The exercise by the League of the sovereignty over these joint conquests of the allied and associated powers, as their successor, by operation of law and their consent, is, it will have been noticed, subjected by the provisions of Article XXII, above quoted, to "securities" or "safeguards" which the Article declares to be indispensable and "embodied in the Covenant"—evidently intending that these "securities" or "safeguards" should be a covenant running with the land, analogous to what the United States in its Ordinance for the Government of the Northwest Territory of 1787 called "Articles of Compact," having the sanctity of a fundamental constitution of the regions designated and all similar regions and applying to these regions for all future time, so long as the population may continue to require tutelage.

The first of these safeguards is, that the sovereignty of the League over these regions shall be true sovereignty, that is, that the governmental power exercised by the League over the backward peoples committed to its care shall be exercised as a "sacred trust of civilization," in order to promote "the well-being and development" of the peoples governed. There is thus assured to the peoples of these regions, in the Lincolnian phrase, government of and for the people, and also, so far as may be practicable, by the people,—and, in the

Rooseveltian phrase, government which shall help the peoples governed to help themselves.

The second of these safeguards is, that the League shall administer its trust for the tutelage of its dependent regions through the instrumentality of one of the civilized states, in every case where such administration is possible. Direct administration by the League is not prohibited and evidently cannot be, since the states are all at liberty to decline to act for it; but administrative tutelage through a state is declared to be "the best method."

The system of mandatary administration is safeguarded in various ways,—first of all, by the legal terms descriptive of the legal obligations assumed by the League and by the state which acts for it. The League is described as the "trustee" of backward peoples committed to its charge, and the state which acts for it is described as its "mandatary." A trustee, under all systems of law, is without power to delegate his trust; hence the League is by necessary implication prohibited from delegating to any state its trustee sovereignty over backward peoples committed to its charge. It must forever retain its responsibility as trustee for such peoples. Its dealing with states regarding such peoples is limited to appointing one of them as its "mandatary,"—that is, as its agent, to do in its behalf what the League may deem proper in order to enable it to perform its trust, and to serve without remuneration,—a mandate being a form of agency in which the agent acts without right to remuneration or profit, though without liability to loss. There is thus contained in the term "mandatary" an implied prohibition against exploitation of backward peoples by mandatary states or their citizens.

Other safeguards for the faithful execution of the

trust assumed by the League in behalf of "civilization" —civilization being thus personified as the supreme trustee of all backward peoples—and in favor of backward peoples placed under its jurisdiction, are established in the provision that no state shall be eligible as mandatary of the League except one which is "advanced," and, therefore, presumably honest; which has "resources," and is, therefore, presumably able and willing to make needful advances of money and credit; which is "experienced" and, therefore, presumably able to succeed in its tutorial work; and which has an appropriate "geographical position," so that it may presumably do the work most conveniently and may have an interest in making a success of it. Still other safeguards are, that the mandate shall be "explicit" respecting the "degree of authority" to be exercised by the mandatary; that the mandatary shall make annual reports to the League; and that it shall at all times be under the surveillance of the League through a commission of surveillance appointed by the League.

There are paragraphs of Article XXII other than those above quoted containing safeguards which especially interest the backward peoples, since they determine the régime to be applied to each according to its stage of development. These paragraphs are as follows:

> The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory and other circumstances.
>
> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a mandatary until such time as they are able to stand alone. The wishes of these communities must

be a principal consideration in the selection of the mandatary.

Other peoples, especially those of Central Africa, are at such a stage that the mandatary must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience or religion, subject only to the maintenance of public order and morals, the prohibition of abuses, such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other members of the League.

By these provisions the sovereignty of the League over these regions is apparently regarded as a paramount sovereignty or overlordship; the ordinary sovereignty or lordship being regarded as vested in the people under tutelage when it is of the first grade, and in the mandatary state when the people is of the second grade. In solving the legal problems of the future which may turn upon the question of sovereignty over these regions, it will apparently be necessary to resort to the principles of the feudal system. The League, as paramount sovereign and overlord, would appear to have under these provisions, the sole duty of protecting from external aggression all the backward regions committed to its paramount sovereignty; the mandatary state, as ordinary sovereign or lord, having only the duty of tutelage or education. The safeguards provided for peoples of the second grade are substantially those established for such peoples by the action of the Berlin African Conference of 1885 and the Brussels African Conference of 1890.

The remaining paragraph of Article XXII other than

those above quoted, concerns a class of peoples under the trusteeship of the League which by reason of their contiguity to the mandatary state and their consequent manifest destiny to be incorporated into its domestic body, or by reason of their insularity, diminutiveness, or other peculiarities, are permitted to be subjected by the League and the mandatary state to a special régime. The words of this paragraph are as follows:

> There are territories, such as Southwest Africa, and certain of the South Pacific Islands which, owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the mandatary, and other circumstances, can be best administered by the mandatary as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In the cases mentioned in the above paragraph, the paramount sovereignty will still, of course, remain in the League and the regions specified will not, in contemplation of the law of nations, constitute an integral part of the territory of the mandatary state. They will simply have a form of administration similar to that which they would have if they were integral parts of its territory. All the constitutional safeguards under the constitution of the mandatary state which would apply if they were integral parts of its territory, will be applicable and also all the constitutional safeguards provided in the Covenant which are for the benefit of the indigenous population.

The Covenant, it will have been noticed, contains no express provisions concerning the revocation of a mandate given by the League to a state. That the League has this power, however, there can, it seems, be no

doubt. A mandate, like every form of agency, is revocable at the election of the principal. The authority given to the League by the Covenant to appoint and commission states as its mandataries and to supervise the states which have accepted its mandate, would seem necessarily to imply the power to revoke the mandate. That the League will not revoke a mandate without just cause and without a judicial determination, is to be assumed.

From the foregoing survey of the safeguards provided in the Covenant to insure the harmonious correlation of all the conflicting interests which will exist concerning backward peoples committed to the charge of the League and administered by it through a state as tutor, it is evident that these safeguards are inadequate in one important respect, namely, as respects the principles to be observed in the selection of the mandatary state. All that the Covenant says on this subject is that those states only shall be eligible to receive a mandate of the League which are "advanced," which have "resources," and "experience," and which have a "convenient geographical position." These safeguards are all good, but in view of existing international conditions and the history of the dealings of civilized states with backward regions, they are clearly not sufficient. There must also be rules making states ineligible in certain cases, if "the mandatary system" is to become, in fact, a part of the great plan "to promote international cooperation and to achieve international peace and security." As rules of ineligibility needful to effectuate this prime object of the League, the following may be suggested:

First, that a conqueror state should be ineligible for a mandate of the League for the tutelage of conquered regions unless the war in which the conquest was made

was waged on the declared issue of misgovernment of the indigenous population by the vanquished state. A civilized state which in a war with another civilized state fought on issues of any other kind shall have seized and occupied the colonies or dependencies of its opponent inhabited by backward peoples should not be permitted to receive benefits from its military seizure and occupation of these backward regions by turning them over to the League and receiving them back as its mandatary. To permit a conqueror state to be eligible for a mandate in such a case must necessarily tend toward the perpetuation of the old rule, so prolific of war, that backward regions are pawns in the game. At the Berlin African Conference of 1885, the United States earnestly urged the establishment by the conference of a rule of ineligibility such as is here suggested as respects Middle Africa.

Second, that a state which has an extensive domestic territory or an extensive external domain should be ineligible for a mandate. To permit a member-state of the League which has a domestic territory far exceeding in extent the average territory of the member-states, or which already holds and governs as its colonies, protectorates, or dependencies so large a part of the world as to give it a monopoly in fact of the economic life of the world and a virtual world dominion, to be eligible to accept a mandate of the League for the tutelage of additional regions would tend to increase the opportunities of such a state for world-monopoly and world-dominion and would also tend to enable the state to control the League for its own benefit. The "mandatary system" is capable of being used so as to have a very considerable effect in bringing about an equalization between the member-states of the League and should undoubtedly be used,

so far as practicable, to effect this very desirable result.

Third, that a member-state of any kind of a federal unity existing within the League should be ineligible for a mandate. To permit a state which is a member of a federal state, or of a federal empire, or federal commonwealth, to be eligible for a mandate of the League would either place such a state in opposition to the federal state, empire, or commonwealth of which it is a member, or if the composite state assented, would enable the composite state indirectly to obtain the mandate for itself.

It should also be provided in the Covenant, as an additional and general safeguard to the whole "mandatary system," that the selection of mandataries of the League should be made only in times of peace, through a judicial proceeding, in which the qualifications of every state will be weighed on its merits; in which the tribunal charged with making the selection will be prohibited from considering any claim based on conquest, military occupation, or other right of war; and in which there will be taken into consideration and brought into harmony all the various interests involved —those of the backward peoples, those of the League, those of the states eligible for mandates and willing to act, and, above all, the general interests of civilization and humanity. The League, in the exercise of its "trusteeship" in behalf of "civilization" for backward peoples, stands in the world in a position analogous to that which the chancellor or the probate judge holds in the state when he is sitting to determine the matter of appointment of a curator for a person not of sound mind, or of a guardian for an infant, in order that, for the benefit of the backward person himself, of his relatives, of the state, and of the civilized world generally,

a tutorial and corrective influence may be exercised, so as to restore the unsound mind to a normal state of soundness or to develop the immature mind to a sound maturity. Such proceedings are in all systems of law regarded as of the highest importance to the sound life of the community and are surrounded by all conceivable safeguards. The principles of the private law concerning curatorship and guardianship form a proper source from which to derive the principles and practices of the "mandatory system" by analogy, so that it shall fit into the general plan of the League and enable the League to effectuate its object.

However novel the "mandatary system" may appear to those unfamiliar with international law and colonial science, it contains no novelty for publicists. Its adoption was an inevitable next step in a long course of evolution beginning with the action of the Congress of Vienna in 1814. At that Congress it was resolved that all the eight members of the Congress, whether possessing colonies in Africa or not, were entitled to participate in the consideration of measures for cooperative action in abolishing the African slave trade, because, as they held, the subject of the relations of civilized states with backward peoples was one affecting public morals and humanity, which was to be determined by all the powers collectively. From this action, the necessary conclusion, which was soon made, was, that the backward peoples of the world are, by the law of nations, under a curatorship or guardianship of all civilized states, collectively and individually. This latter principle was applied, or at least was purported to be applied, at various times during the century preceding the Great War, in the dealings of the Concert of Europe with Turkey, Greece, Egypt, the Balkan States and Morocco; in the dealings of the Concert of Europe

and the United States with Japan and China; and especially in the dealings of the Concert of Europe, the United States and the Oriental Powers with Middle Africa at the Berlin African Conference in 1885 and the Brussels African Conference in 1890. The League of Nations, as the trustee in behalf of civilization, in favor of backward peoples, is the natural successor of these various "concerts" of civilized states which from time to time—with little success, it must be admitted—have attempted to represent "civilization" and bring about a cooperative relationship between the civilized and the backward peoples. Condominion of backward peoples by two or more states was proved to be impossible in the case of Egypt and the Samoan Islands; and, for a quarter of a century preceding the Great War, it had been recognized that the best method of tutelage of backward peoples was for all the civilized states collectively to assent to some one civilized state placing itself in care of each backward people, and for them all collectively, acting by way of "concert" to hold that state responsible as their mandatary to perform the trusteeship of civilization for the tutelage of the backward peoples. From acting by way of "concert" to acting as now proposed, by way of "league" was but a short step, and one which was sooner or later certain to be taken.

The question of the desirability of a state accepting a mandate of the League under the Covenant in its present form, has been much discussed. This is really a question whether the general safeguards of the League which are now provided by the Covenant, are adequate to prevent perversion; and whether, even if they are so on paper, the League is likely to be perverted in fact, and the Covenant made an instrument of world monopoly and world domination by one state or by a

group of states. Under the Covenant in its present form the whole power of the League is concentrated in the Council and Assembly—virtually in the Council. These organs of the League have power not only to advise concerning international cooperation in peaceful activities, but also to advise and superintend the coercion of a member-state by the other states so as to compel it to desist from alleged anti-cooperative action and make reparation therefor. The peace powers and the war powers of the League are thus in the same hands. A state which, on account of its geographical position or for other reasons is in danger of having this war-power of the League turned against it on grounds deemed adequate by these organs of the League acting at their discretion, might well decline to accept a mandate of the League or any other international responsibility likely to weaken its defensive power. It would seem that the Council and Assembly of the League should be confined to advising the member-states concerning peaceful cooperative action, and that when it appears to be necessary to coerce a state for anti-cooperative action, this question should be determined by an extraordinary judicial assembly of the other states summoned in a predetermined manner, and that this same extraordinary assembly should, in case it decides adversely to the state charged with anti-cooperative action, advise and control the necessary joint constabulary and corrective measures taken by the states thus allied against the state adjudged to be an international wrongdoer. Assuming that the Covenant will, at the time it goes into effect, be adequate to institute a League which will in other regards accomplish the declared object of promoting international cooperation and achieving international peace and security, it would seem that the "mandatary system" would

be a fitting feature of the general plan, and that, if there could be incorporated in the Covenant the additional safeguards of the system above outlined, there would be reason to hope it might be successful.

That there would be much risk and little honor in the assumption, by any of the powers which are the conquerors in the late war, of the mandate of the League over the backward conquered regions to which alone the Covenant in its present form relates, seems certain. The history of all civilized states in dealing with backward peoples is deeply stained with "atrocities," and comparison cannot now be admitted—especially comparison based on interested testimony gathered during the war. An examination of the literature of the world before the war, will, it is believed, show that the publicists of the powers which are now in the position of victors, found no fault with the title of the powers which are now in the position of vanquished, to the backward regions under their jurisdiction; and that in estimating the comparative value to civilization of the colonizing activities of the various powers, colonial experts recognized as highly valuable the work done by the now vanquished powers. The case of Turkey is, of course, that of a sick man, whose sickness has been made worse by the conflicting ministrations of his alleged physicians. A state accepting a mandate for the care of such a patient would need to be assured that the physicians previously in charge of the case would voluntarily and entirely withdraw.

If the "mandatary system" should prove successful in the case of the backward peoples committed to the care of the League of the Covenant, it would doubtless gradually be extended to include the colonies, protectorates and dependencies of civilized states inhabited by backward peoples. Each such state which desired

to act honestly as respects the backward peoples dependent upon it, would have a strong motive to relinquish its dependencies to the League in case it could receive them back as mandatary, for the protection of these regions against external aggression would then fall upon the League. The vast navies now kept up by colonizing states as "insurance" against the loss of colonies could then be dispensed with, and unwillingness of a colonizing state to assume toward its colonies the relationship of mandatary of the League would give rise to the suspicion that it desired to exploit the backward peoples under its control and required its navy to insure freedom from interference in its work of exploitation.

The "mandatary system" is, it is evident, a necessary part of the new system in which the civilized states recognize themselves as having with each other social relations of a legal nature, as well as those purely contractual and economic relations with which international law proper is concerned. There thus seems to be coming into existence, through the establishment of this "society of the civilized states," as The Hague Conferences called it, by international convention, a new division of the general public law, distinct from international law proper—a social law of nations, of which the "mandatary system" forms a part.

THE SHANTUNG QUESTION AND SPHERES OF INFLUENCE

THE SHANTUNG QUESTION AND SPHERES OF INFLUENCE

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THE Shantung Question arises out of the following provision of the Peace Treaty:

Germany renounces, in favor of Japan, all her rights, title and privileges—particularly those concerning the territory of Kiaochow, railways, mines, and submarine cables—which she acquired in virtue of the treaty concluded by her with China on March 6, 1898, and of all other arrangements relative to the Province of Shantung.

The "rights, title and privileges" in question are exclusively those which Germany had, on China's domestic territory and within the sphere of its sovereignty, by "treaty" with China and by "arrangements" with the other states having influence in China.

The treaty of March 6, 1898, between China and Germany, as published at Shanghai in 1908 by the Chinese (British-controlled) Imperial Customs Office, was composed of a preamble, three parts, and ratification clauses and signatures. The first part is headed "Lease of Kiaochow," the second, "Railroad and Mining Concessions," and the third, "Priority-Rights in the Province of Shantung."

In the first sentence of the preamble it was stated that the incident at the mission station in the prefecture Tsaochoufu in Shantung had been settled at the time

the treaty was made. This incident was the murder of two German Roman Catholic missionaries, about four months previously, at the town which was the birthplace of Confucius, by Chinese political rioters who were members of anti-foreigner societies. Germany sent ships to Kiaochow Bay and landed marines, holding the bay as security for reparation.

The facts concerning the incident and its settlement are given in the correspondence between Sir Claude MacDonald, the British Minister to China, and Lord Salisbury, published in the Parliamentary Papers. The murder of the German priests, as a political anti-Christian and anti-foreigner act, and the complicity of the Governor of Shantung, were conclusively proved by the testimony of a third German priest who was attacked with the two others and who escaped. The naval action of Germany relieved Great Britain from carrying out a threat to send a punitive expedition into Shantung, as is shown by the following extract from a letter of Sir Claude MacDonald to Lord Salisbury, of December 1, 1897:

During the summer there were prevalent in this province rumors of the kidnapping of children of foreigners, which produced much excitement, and placed the missionaries in the interior in great danger. The Governor, in spite of much pressure, did nothing to suppress these rumors, and even by his attitude gave them tacit encouragement. After repeatedly calling the Yamên's attention to his conduct, I was at last obliged to desire them to warn him that if any serious incident occurred as a result of his anti-foreign spirit, he would find himself in jeopardy. This I did in a note so long ago as the 27th of July, and the result was, according to a report from His Majesty's council at Chefoo, that active measures were at length taken to check the rumors and the ferment thereupon subsided.

It is not possible at present to ascertain whether this agitation has indirectly led to the present outrage, but the Governor's attitude has been such as to induce full approval of the German demand for his dismissal.

That the sending of the three small German cruisers from Shanghai, where they had been lying, to Kiaochow Bay, had the acquiescence, if not the approval, of Great Britain, which, then as now, controlled the coasts of China from Hong-Kong, is shown by the following extract from the same letter:

> If the German occupation of Kiaochow is only used as a leverage for obtaining satisfactory reparation, . . . for the murder of German missionaries, the effect on the security of our own people will be of the best.
>
> If, on the other hand, the German object is to secure Kiaochow as a naval station under cover of their demands for reparation, it is by no means clear that their acquisition of it will prejudice our interests.

The terms of the reparation settlement were agreed upon about two months before the treaty was signed. The Governor was degraded. The money reparation included compensation to the relatives of the murdered priests, damages for injury to the mission buildings, and a contribution to the building of mission chapels near the scene of the murder. The reparation-money was paid to the Roman Catholic authorities. Germany obtained, for itself and all foreign states, an Imperial tablet condemnatory of the anti-Christian and anti-foreigner proceedings. The next year the Vatican granted to Germany the ecclesiastical protectorate over Roman Catholics in Shantung; this religious sphere of influence being subtracted from that of France, which had theretofore extended over all China.

The treaty stated that the Chinese Government regarded the occasion of the amicable closing of the reparation settlement as an appropriate one for giving a concrete evidence of its grateful recognition of friendship shown to it by Germany. Though repayment of the social obligation is thus put forward as the main inducement on the part of China in making the treaty, it is also stated, as further inducement, that China is desirous of "increasing the military preparedness of the Empire." The inducement on Germany's part is declared to be its desire to have, "like other powers, a place on the Chinese coast, under its own jurisdiction" —which desire China declares to be "justifiable." The inducement on the part of both Germany and China is declared to be a "mutual and reciprocal desire further to develop the economic and commercial relations between the citizens of the two states."

The treaty granted an extraterritorial port privilege within the area including Kiaochow Bay and its environs—a land-and-water area about fifteen miles square —together with an extraterritorial foreign-settlement privilege on the shore of Kiaochow Bay. This area was leased to Germany for ninety-nine years "for the repair and equipment of ships, for the storage of materials and provisions for the same, and for other arrangements connected therewith." It was provided that Germany should "construct, at a suitable time, on the leased territory, fortifications for the protection of the buildings and the defense of the entrance to the harbor."

The German words concerning the leasehold grant were *überlässt pachtweise vorläufig auf 99 Jahre.* A literal translation of this phrase is "grants according to the analogy of leases [in German law], as a provisional or interlocutory measure (*vorläufig*) for ninety-nine years." It seems probable that by the use of the word

vorläufig, it was intended by the parties to make the lease subject to the terms of the international *entente* concerning spheres of influence in China, not only as that *entente* then existed but also as it should be varied in the future by mutual agreement of China and the powers.

It was also provided that "in order to avoid the possibility of conflicts, the Imperial Chinese Government will abstain from exercising rights of sovereignty in the ceded territory during the term of the lease." China had thus the paramount sovereignty over the leased territory, and Germany a sovereignty subordinate to that of China and limited by the terms of the lease. China reserved to its citizens and shipping within the leased area the same rights as the citizens and shipping of other states.

Inasmuch as Germany's leasehold territory was a part of the coast border of China, it was agreed that Germany should take no action within that territory which would interfere with the unity of the Chinese tariff. Germany had thus the option to make a designated port of its leased territory a free port—which she did—or to collect there the Chinese tariff and pay it to China.

In order that the relationship between Germany and China might be continued in case Germany should see fit to resign its leasehold privileges, it was provided that "should Germany at some future time express the wish to restore Kiaochow Bay to China before the expiration of the lease, China agrees to refund to Germany the expenditure she has incurred at Kiaochow, and to cede to Germany a more suitable port."

As incidental to the necessity of obtaining an adequate water-supply for the leased territory and enabling it to be defended without violating China's sovereignty, a zone of land thirty miles wide adjoin-

ing the leased territory was by the treaty placed under a kind of partnership sovereignty (*vereinbart*). Within this zone, China expressly retained full sovereignty, but agreed "to abstain from taking any measures, or issuing any ordinances therein, without the previous consent of the German Government, and especially to place no obstacle in the way of any regulation of the watercourses which may prove to be necessary."

The second part of the treaty, headed "Railroad and Mining Concessions," was concerned solely with two specifically described railroad-and-mining concessions in Shantung. These were by the treaty definitely allotted to German-Chinese corporations to be formed for the purpose, in which the German and Chinese stockholders were to have equal rights and proportional representation in the directorate. Provisions were made to assure the protection of the German personnel of the working staff; and it was required that the work should be done, and the concessions operated, in conformity with the general regulations of China. The two railroads formed a branch to connect Kiaochow Bay with the proposed trunk line from Peking to Canton. This trunk line, when extended southward to the British railroad system in Burma and the French system in Indo-China, was to form a part of the southern Peking-to-Paris line which was to compete with the Peking-to-Paris line via the Manchurian and the Russian Trans-Siberian Railways. As respects the section of this trunk line in Shantung, the treaty gave no special concession to German or German-Chinese corporations. The mining privileges within a zone of twelve miles wide on either side of the German-Chinese branch line specified in the concession were also granted. These concessions were to be operated by German-Chinese corporations on the same terms as the railroad concession.

The third part of the treaty, headed "Priority Rights in the Province of Shantung," related to all future internal development concessions in Shantung which China might see fit to open to foreign bidding. It has been claimed that the effect of Part III was to give Germany a right of sovereignty throughout the Province of Shantung. The words of the treaty disprove this claim and show that Germany had only an economic privilege in behalf of its engineers and merchants. The German text and the translation of this part of the treaty are as follows:

III—Theil.—Prioritätsrechte in der Provinz Shantung.

Die Kaiserlich Chinesische Regierung verpflichtet sich in allen Fällen, wo zu irgendwelchen Zwecken innerhalb der Provinz Shantung fremdländische Hülfe an Personen, an Kapital oder Material in Anspruch genommen werden soll, die betreffenden Arbeiten oder die Lieferung von zunächst deutschen Industriellen und Handeltreibenden, welche sich mit dergleichen Sachen befassen, anzubieten.

Falls die deutschen Industriellen und Handeltreibenden nicht geneigt sind, die

Part III—Priority Rights in the Province of Shantung.

The Chinese Imperial Government obligates itself, in all cases in which foreign aid for any purpose, within the Province of Shantung, shall be solicited, in the form of personal services, the furnishing of capital, or the supply of materials, to present the proposals and specifications for the public works or material-supply under consideration, in the first instance to German industrial-development-engineers and material-supply-merchants who are engaged in similar undertakings, for a bid by them.

In case the German industrial-development-engineers and material-supply-mer-

Ausführung solcher Arbeiten oder die Lieferung von Materialien zu übernehmen, so soll China nach Belieben anders verfahren können.	chants are not disposed to undertake the public works or the supply of materials under consideration, China shall be free to proceed in any manner which it may deem expedient.

Under this article, the Chinese Government was obligated to offer first to competent German contractors its specifications for any public improvements which it thought proper to make in Shantung, and for which it desired foreign aid. It was free to reject any bid so obtained, and the German contractors could not, by refusing to bid, interfere with China's freedom of action. Only in case the German contractors made a bid which the Chinese Government considered advantageous, and which was in fact better than was likely to be obtained elsewhere, could they hope for the contract. The fact that the railroad coast-terminal was under German jurisdiction and that the railroads from the coast to the interior, and the mines adjacent, were owned and operated by German-Chinese corporations, would protect the German contractors, and might enable them in most cases to make a better bid than their competitors. They and their competitors were assured by the "Hay Proposals," which were accepted by Germany and the other powers, against discrimination either through railroad rates, customs duties, or harbor dues.

Considering the risk incident to railroad and mining enterprises, and public contracts of all kinds, in the unsettled condition of China, the economic concessions granted by the treaty seem not to have been unreasonable. Nor, it would seem, were the political privileges at the coast-terminal, or the military and water-supply privileges in the adjoining defensive zone, greater than

were reasonably necessary to make the economic privileges effective. Certainly, these specific and carefully defined privileges compare favorably with the indefinite privileges claimed by the other powers having spheres of influence in China under their various treaties and concessions.

There appears to have been no abuse by Germany of the social, political, and economic privileges granted to her. That such privileges are capable of gross abuse in the hands of a power disposed to use them for political purposes goes without saying.

The proposals which Germany made to China in December, 1898, for railroad, terminal-port and priority-bid-right concessions in Shantung were understood by China and all the treaty powers to have for their object the obtaining by Germany of a sphere of influence similar to those of other powers.

Since 1841, when Great Britain, at the close of the Opium War, obtained a cession of Hong-Kong in perpetuity, Great Britain had claimed and exercised the paramount sphere of influence over all China proper. France, asserting a "special interest" in South China, by reason of the "propinquity" of its conquests and colonies at the southern extremity of China—Tonkin, Annam, and Cochin-China—claimed a sphere of influence in South China up to the Yang-tse Valley. Russia, under the secret—though unofficially published—"Cassini Convention" of 1896, was claiming a sphere of influence throughout Manchuria.

Japan, ejected from Manchuria in 1895, after having exacted it from China in the Chinese-Japanese War, had Korea and Formosa, and was in military occupation of Wei-hai-wei in North Shantung, holding it as security for payment of the indemnity exacted.

Of the outer states of the Chinese Empire, Burma was

a colony of Great Britain, and Thibet and Western Mongolia were under its sole influence. A Russian sphere of influence was extended over Eastern Mongolia.

In order that Germany might acquire a sphere of influence, it was necessary that she should obtain from China the minimum privileges necessary to create such a sphere, and that the treaty of concession should be confirmed by "arrangements" with Great Britain, France, and Russia. Russia, in its effort to secure the approval of Great Britain and France to its still doubtful claim to a sphere of influence in Manchuria, was in the same position as Germany. Moreover, under the Cassini Convention, Russia was granted a fifteen-year lease of Kiaochow Bay, and only economic terminal rights, under China's full sovereignty, at Port Arthur and Talienwan. She was therefore willing to relinquish her political rights in Kiaochow Bay in case she could obtain political rights at the terminals of her Manchurian railroad necessary for the protection of the railroad enterprise. Thus Germany and Russia, together, were able to bring about a discussion of the whole question of the propriety of spheres of influence in China, their relation to the traditional policy of the powers, and the rearrangements necessitated by the advent of the two powers.

There was no doubt concerning the traditional policy of the powers with respect to China. By all the treaties, it was expressed or implied that the sovereignty of China was recognized and was to be respected; that the integrity of its territorial domain was to be preserved; and that the nationals of all foreign nations in China were to be assured equal commercial opportunity without any discrimination. To this general policy, which the Occidental States profess (though rarely practice) towards all transitional states, the popular name of "the

open door" is applied. The Conference of Algeciras of 1906 regarding Morocco, gave it a better name—"the triple principle"—which, however, has not yet come into popular use.

In 1898, the question of the relation of spheres of influence to the open-door policy was raised by collisions of interests of the sphere-of-influence powers in various parts of the world; particularly in Africa by the Fashoda incident, and in China by the claims of Russia and Germany. The subject became a matter of public discussion. The liberals in Europe and the United States asserted that spheres of influence were mere veiled processes of partition, military conquest and annexation, and unjustifiable; the conservatives, that they were necessary to the economic development of the world, and legitimate.

Between December, 1897, and March, 1898, negotiations occurred between the Governments of the leading nations, and an *entente* on the subject was reached. The *entente* determined particularly the relations of the Occidental States and Japan to China, and that of the European States to Middle and Northeastern Africa, and established the necessary arrangements. The principles agreed upon in this *entente*, as to China, were announced by Mr. Balfour, then Leader of the House, in an address to his constituents in East Manchester on January 10, 1898; and as to Africa, in a speech in the British House of Commons by Mr. Chamberlain, Secretary for the Colonies, on February 24—Sir Edward Grey, the Opposition leader, concurring. The treaty between China and Germany was signed on March 6, 1898.

Mr. Balfour stated the *entente* concerning China in terms of "British policy." This policy, he said, was primarily to maintain the open door in China. Great

Britain, he said, did not regard it as contrary to this primary principle that other states should have in China extraterritorial port-privileges and accompanying foreign-settlement privileges, provided these ports were kept open on equal terms to the commerce of all nations, and provided the unity and uniformity of the customs system of China was not interfered with. Great Britain, he also said, did not regard it as contrary to this primary principle that other nations than Great Britain should have economic rights on behalf of their nationals in the foreign trade of China or in aiding China with respect to its internal development, provided these rights were not exclusive. This statement, which was shown by Mr. Chamberlain's statement of February 24 concerning Africa to have been accepted by France as a part of the general *entente*, amounted to an approval of the pending proposal of Russia for a sphere of influence in Manchuria, and of Germany for a sphere of influence in Shantung, since these proposals conformed to the rules established by the *entente* concerning China. The needful grants and ratifying acquiescences were exchanged during the year 1898. The final details of the *entente* as respects China were arranged on the initiative of the United States, through the "Hay Proposals" of July, 1899, addressed to and accepted by the powers having or claiming to have spheres of influence in China. It was by the "Hay Proposals," apparently, that the term "sphere of influence" first received international recognition as a term describing a legitimate international institution.

Russia relinquished the leasehold of Kiaochow Bay in consideration of obtaining the undisputed sphere of influence for railroad and mining development in Manchuria, terminal-port and extraterritorial foreign-settlement privileges at Talienwan (later Dalny) under

a twenty-five year lease, and fortress rights for the same period at the natural Manchurian fortress of Port Arthur. In addition to the enormous colonies and concessions previously mentioned, France and Great Britain seized the opportunity further to increase their influence and territory. France acquiesced in the various arrangements, in consideration of obtaining terminal-port and extraterritorial foreign-settlement privilege by ninety-nine year lease at Kwang-chau-wan, in the southern extremity of China, and a sphere of influence for railroad and mining development in the southern part of China to the limits of the valley of the Yang-tse River; China's hesitant action being quickened by military pressure brought to bear by France on account of the murder of two French naval officers near Kwang-chau-wan. Great Britain obtained various compensations—first, the fortress and naval base of Wei-hai-wei in North Shantung, commanding the German concession at Kiaochow, Port Arthur, the Gulf of Pechili, Peking, and all North China. This port was then held by Japan as security for payment of the indemnity exacted by it from China by the terms of the treaty of peace at the close of the Chinese-Japanese War. A German and a British banking syndicate provided China with the necessary loan to pay the indemnity, in equal shares. Great Britain further obtained from China the concession, by ninety-nine year lease, of the Kowloon district on the mainland of China opposite to the British island fortress and naval and commercial harbor of Hong-Kong, thus securing the encircling territory of Hong-Kong Bay and being enabled to complete its fortification. She also obtained the assurance of all concerned that her sphere of influence throughout the Yang-tse Valley—the great and enormously productive middle zone of China, including

the international port and city of Shanghai—should remain undisputed. The area of North China, north of Shantung, including Peking and the international port and city of Tientsin, was recognized as an international political sphere of influence, though still economically a British sphere. Italy demanded a port and a sphere of influence, but was denied the privilege. With the consent of China, it was agreed that a British banking syndicate should finance and build the south half of the Shantung section of the South Peking-to-Paris trunk line then projected to pass through Nanking and Canton, and that a German banking syndicate should build the north half of the section.

The indemnity to Japan furnished by England and Germany having been paid, Japan evacuated Wei-hai-wei, and being thus forced out of China was compelled to content herself temporarily with Korea and the island of Formosa, which she had obtained from China by conquest in the Chinese-Japanese War. The government officials of China viewed with relief the action of Germany and Russia in obtaining their ports and spheres of influence, as strengthening the defenses of China by placing two more Occidental powers on the coast facing Japan. The common people, however, regarded the institution of the spheres of influence with suspicion. They had been deeply angered at the humiliating despoilment insisted upon by Japan at the close of the Chinese-Japanese War, which was permitted by the Occidental powers. They henceforth regarded Japan as China's permanent enemy and looked upon the Occidental powers as treacherous friends, who, while professing to regard China as an independent state, were, by means of Japan, preparing the way for China's disorganization, partition, and ultimate enslavement. At that time, 1895, the anti-foreign and anti-

Christian movement which in 1900 eventuated in the Boxer Revolution and the massacre of the foreigners, and especially Christians, had its beginning. This movement was not assuaged by the action of the powers in 1896, in inducing Japan to give up her conquests in Manchuria; for it soon appeared that, as compensation, China was forced to give her the privilege of having a foreign consular jurisdiction over all citizens of Japan throughout China. Japan was thus put on a parity with the Occidental States, while China was denied a reciprocal privilege in Japan—an intense humiliation, which both Government and people of China properly resented.

The international arrangements of 1898 were in pursuance of a definite, well thought-out plan. The railroad and mining enterprises were to be instruments of defense as well as means for internal development. The one probable aggressor had in mind by all concerned was Japan; and the probable place of invasion was Kiaochow Bay, since this from a military standpoint is best adapted for sudden invasion. Great Britain, intrenched at its fortresses of Wei-hai-wei and Hong-Kong, and still claiming a paramount sphere of influence over China for all purposes, supervised Germany's operations in Shantung and Russia's operations in Manchuria. All the Occidental States concerned were so located on the coast of China that, united, they could render such prompt aid as to make a Japanese invasion impossible. Disunion of these states in 1905 permitted Japan to seize Port Arthur and Dalny. The defenses of China against Japan are seriously weakened by the political sphere of influence and the strategic military position which Japan holds in Southern Manchuria.

Germany's privileges, under the treaty, though essentially economic, were also social and of a strictly per-

sonal and highly confidential character. The spheres of influence were granted by China to Germany and to the other states as personal and social privileges, in order that both might receive benefit. All social privileges are based on friendship and a desire to help one's friends and one's self, and are by their nature non-transferable. The relations of close friendship on which such privileges are based do not rise from "propinquity." A neighbor is not necessarily a friend; certainly not always one whom one would choose as a trusted associate in developing one's own property, or to whom one would give the privilege of a continuous lodgment on one's homestead. On the contrary, a neighbor who is untrustworthy is by his neighborhood doubly disqualified from being admitted into such a confidential social relationship, and neighborhood in such case is only disadvantageous. The only "special relations" which any state can properly put forward as entitling it to a sphere of influence within the body-politic of another state, are the "special relations" of friendship, mutual confidence and mutual aid, which grow up between states and persons of good will toward each other; and the only "special interests" are those which each state and each person has in advancing the welfare of all other states and all other persons. These "special relations," and "special interests," are the basis of the Monroe Doctrine.

The leasehold rights of Germany were expressly declared to be non-transferable. The provision in the German text of the treaty is: "*Deutschland verpflichtet sich das von China gepachtete Gebiet niemals an eine andere Macht weiter zu verpachten.*" A literal translation of these words is: "Germany obligates itself never to extend farther the leasing process, as respects the territory leased from China, to any other state."

This clearly cuts off all privilege of transfer of the territory, whether by assignment or sub-lease.

So long as China was neutral, the concessions to Germany doubtless remained in force. The military operations of Great Britain and Japan, outside the leased territory, and probably also within it, were violations of China's neutrality. By China's co-belligerency with Great Britain and Japan, these violations were doubtless condoned. On the declaration of war by China, Germany's privileges of all kinds in Shantung lapsed, and her state-property in the leased territory reverted to China. The action of the Allied and Associated Powers is, therefore, not a transfer of Germany's sphere of influence to Japan, but the attempted institution by the allied and associated states other than China of a new sphere of influence in favor of Japan in Shantung similar to that which Germany had before the war; and an attempted transfer to Japan of the title of China to the former public property of Germany in Tsingtao. China properly insists upon the right to choose among all the states of the world, without regard to their location, those whom it regards as states of good will, and to select those whom it may properly admit to its honor and confidence and to lodgment within its own domains, in order that they may help it in helping itself during the trying period of its transition from an Oriental to an Occidental economic status. The "twenty-one demands" of Japan, backed by military force, are in law nugatory. The secret treaties of Great Britain and France with Japan, and the action of the President of the United States in signing the Shantung provision of the Peace Treaty, are equally nugatory. It only remains for the Senate of the United States to announce the legal situation, and to insist upon an amendment whereby

the Shantung provisions will be stricken out of the treaty.

The theory and practice of the various states differ as respects spheres of influence. According to French and Japanese philosophy, they are essentially political institutions having an economic and also a political object. By the Germans and Russians they are regarded as essentially economic-social institutions, with such political privileges as are needful to render them efficient. In British practice they are one thing or the other according to the views of the British government concerning the policy to be pursued in any particular exigency. The United States, by the "Hay Proposals," recognized spheres of influence as legitimate institutions without attempting to define their import. Whatever the theory or practice, however, they unquestionably menace the peace of the states where they exist and the proper economic development of the world.

THE DISPOSITION OF THE GERMAN COLONIES

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I

IN considering the disposition to be made of Germany's interests in territory and sovereignty outside its domestic frontiers, it is necessary to distinguish its colonies—that is, those regions of whose territory it had full title and over whose people it had full sovereignty—from its concessions—that is, the easements in land and personal privileges which had been granted to it by a state, to be exercised by it upon the territory and under the sovereignty of that state.

The German colonies were Togoland, Cameroon, German East Africa, German Southwest Africa, German New Guinea, and certain islands in the Pacific Ocean; the interests which it had in China (including those under the Shantung treaty), Siam, and other states being concessions.

For purposes of disposition, the colonies were grouped and divided thus:

Togoland, Cameroon, and German East Africa formed a group. All these colonies were tropical and were densely inhabited by blacks, with a few white settlers. They were all within the Conventional Basin of the Congo as fixed by the Berlin African Act of 1885, and also within the much larger Middle African Zone

of International Influence established by the Brussels African Act of 1890, and were subject to the provisions of these international acts. This group was divided into two parts, one consisting of Togoland and Cameroon, and the other of German East Africa. France and Great Britain owned colonies adjoining Togoland and Cameroon; British and Portuguese colonies adjoined German East Africa; and the Belgian Congo lay between Cameroon and German East Africa.

German Southwest Africa required to be considered separately. It was outside the Congo Basin and the International Zone. Its climate was healthful. Its population included a considerable settlement of whites, and a large number of partly civilized blacks. The adjoining regions were British and Portuguese. The Union of South Africa had long desired to annex it; but according to international law such annexation could be effected only by Great Britain first annexing German Southwest Africa as a colony and then placing it by executive order or Act of Parliament under the jurisdiction of South Africa.

German New Guinea also required to be considered separately. It formed a part of the large island of New Guinea lying off the north coast of Australia, the rest of the island being divided into two parts, one of which was a colony of Great Britain and the other a colony of Holland. Within the German Colony of New Guinea was located the headquarters of the government of Germany's Pacific Island possessions. The Commonwealth of Australia had long desired to annex the whole island of New Guinea as a colony, but could acquire territory only through Great Britain.

Of the other German islands south of the equator, the Bismarck and the Solomon Islands might be regarded either separately or as grouped with German

New Guinea. German Samoa is a part of a group, the remainder of which is owned by the United States. The German Samoan Islands were desired by New Zealand. Here, as in the case of South Africa and Australia, the acquisition could be effected only through Great Britain.

North of the equator lie the Ladrone, Caroline, Pelew, and Marshall Islands. These might be regarded either separately or as part of a group; but the group, in order to be complete, would have to include the Philippines and Guam, which they surround. The Marshall Islands lie between the Philippines and Hawaii—that is, between the United States and China. The manner of disposition of all these islands was especially important to the United States.

By commitments of Great Britain to Australia, South Africa and New Zealand, it was arranged that they should conquer the German colonies desired by them, and that Great Britain would do all in its power to secure their conquests to them at the peace. By unpublished understanding between Great Britain and France, they were to conquer Togoland and Cameroon, and to support each other at the peace in obtaining a disposition to them jointly, subject to partition by their agreement, France agreeing to support the British claim to German East Africa, subject to arrangement with Belgium.

In February and March, 1917, Japan, in the same secret agreement with Great Britain and France by which they acquiesced in its claim to have Germany's Shantung concessions, secured their consent to conquer the German Islands north of the equator and their agreement to support its claim to those islands. Great Britain's acquiescence was on the understanding, which was accepted by Japan, that Japan would "in the

eventual peace settlement treat in the same spirit Great Britain's claims to the German Islands south of the Equator." France agreed to Japan's demand in consideration that Japan would agree—as it did—to "give its support to obtain from China the breaking of its diplomatic relations with Germany," Japan also agreeing to use its efforts so that China, upon the breach of diplomatic relations, would proceed to confiscate all German interests within its territory and eject or eliminate Germans and German influence.

Against the military operations of the Allies, resistance was made by Germans to the utmost extent possible. In German New Guinea and the Pacific Islands other than German Samoa, resistance by the few resident Germans was out of the question, and the conquest consisted merely in taking possession. In the African colonies, Allies and Germans were assisted by forces of blacks trained and led by them. Togoland and Cameroon were captured by a British and French force; German Southwest Africa by forces of the Union of South Africa; German East Africa by a British and East Indian force with forces from the Belgian Congo; German New Guinea and the islands in the Pacific south of the equator (not including German Samoa) by an Australian naval expedition; German Samoa by a New Zealand naval expedition; and the German Pacific Islands north of the equator by a Japanese naval expedition.

Conquests of colonies inhabited by aboriginal tribes, it has long been realized, involve the setting of these tribes against each other and tend to demoralize them and make them dangerous to civilization. The two parties of civilized men who are fighting each other, few in number on account of climatic conditions, and surrounded by the natives, from the necessity of the case use threats, persuasion, bribery, and flattery, and

play upon the emotions of these ignorant and childlike peoples, in order to obtain their military assistance in the struggle. With a view to prevent the injury to the natives and the devastation of settlements and missions caused by arousing their fighting spirit, a determined effort was made by the United States, at the time when the question of Middle Africa first arose, to place it in a situation where it could not be used as a theatre of war by civilized states. At the Berlin African Conference of 1885, the United States, supported by Germany and Great Britain, nearly succeeded in obtaining the insertion in the final act of a provision whereby the whole Conventional Basin of the Congo would have been permanently neutralized under international guaranty. The sentiment of the Conference was strongly in favor of this action. France tenaciously opposed it, the French chief delegate, Baron de Courcel, asserting that neutralization of the region was impracticable because "when a state is at war, it wages war by all means in its power." The Conference did, however, adopt a provision requiring the signatories of the final act to use their good offices to induce the belligerents in European wars to neutralize the Middle African colonies of either or both of them during the war by mutual agreement. The United States, as Secretary of State Root held in 1907, though not a party to the Berlin African Act as a whole, since the Senate did not ratify it, is, by reason of being a party to the Brussels African Act, a party by adoption to all that part of the Berlin Act which has for its object the protection of the native inhabitants. But neither the United States, when it was neutral, nor any of the parties to the Berlin Act, tendered its good offices to the belligerents in the late war for the purpose of having its Middle African colonies neutralized during the war's continuance.

It has been maintained that the capture of the German colonies by the Allies did not have the character of a conquest, because Germany acquired its title to them illegally. An examination of the facts, however, shows that its titles were acquired according to methods recognized by international law and practiced by other states, and that they had many times been confirmed by treaties and international arrangements.

It has also been stated that the conquests were made by the Allies in order to liberate the native populations. That natives were abused in German Southwest Africa and German East Africa is indisputable. Similar abuses occurred in the African colonies of all the other states. Up to the time of the war and even during its early months the colonial administrative methods of Germany were praised by British experts. Its work in industrial education of the natives, in medical and scientific research, and in the maintenance of public health, was recognized by them as remarkable. A comparison of the penal laws instituted for the natives under German administration with those of other states having similar colonies shows that these laws were as humane as those of the others.

II

The fifth of the Fourteen Points announced on January 8, 1918, by President Wilson, and accepted by the belligerents as the basis of the peace treaty, was as follows:

> A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interest of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

The Peace Conference, in organizing itself, instituted, as its chief organ, a controlling committee of five composed of representatives of the five principal Allies—Great Britain, France, the United States, Italy, and Japan. This committee was called the "Council," or the "Supreme Council," of the Conference. The Allied and Associated Powers regarded themselves as the "Concert of Nations." The jurisdiction of the "Concert of Nations" was undefined, and was in fact extended, through the Council, to the doing of whatever the Council saw fit to do. The "Constitution" or "Covenant" adopted by the Conference was intended to continue and define the "Concert of Nations" and convert it into a permanent "League of Nations." President Wilson in his address to the Senate on July 10, 1919, on the occasion of his presentation of the peace treaty, spoke of the Conference as engaged in "the difficult work of arranging an all but universal adjustment of the world's affairs," and said:

> The Conference . . . was not to be ephemeral. The Concert of Nations was to continue, under a definite Covenant which had been agreed upon and which all were convinced was workable. They could go forward with confidence to make arrangements intended to be permanent.

The delegates of the United States to the Conference of the group of victor states to formulate terms of peace with the vanquished group were undoubtedly without constitutional authority to bring about or participate in a conversion of the Conference of victors into a universal government having supreme jurisdiction over all states; and if the peace treaty purports to legitimize and perpetuate such an act of the Conference, as it seems to do, it will be of no validity for this purpose, so far as the United States is concerned, even though

the peace treaty were ratified by the Senate. Such an act would be an entering into a union with other states and would require a constitutional amendment or at least previous approval by act of Congress.

The Covenant of the League of Nations, which was adopted by the Conference on April 28, 1919, and incorporated in the peace treaty, made no distribution of the German colonies. By Article XXII it made a provision for their administration by any states to which they should be distributed, specifying that the distribution should be "to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to undertake it," and requiring that any such distributee state should be held to be a mandatory on behalf of the League of Nations in administering the region, and should be under the surveillance of the League. This necessarily implied that the distribution was to be made by the League.

The Covenant permitted a self-governing dominion or colony to be a member of the League, and referred to the members of the League as "states." A self-governing colony or dominion, upon becoming a member of the League, is thereby undoubtedly recognized as an independent state. Inasmuch as Canada, Australia, South Africa, New Zealand, and India are parties to the Covenant, the adoption of it will thus make each of them independent and eligible to receive a mandate for administering any region, in any part of the world, which may be distributed to them by the League. The possibilities involved in this arrangement deserve careful consideration.

On May 5, 1919, a "provisional organization of the League of Nations" was made at Paris. In the published report it was said that "in adopting the rules for

the temporary organization care was taken by the committee that nothing of a permanent nature should be done previous to the ratification of the peace treaty by the United States Senate."

During the period from April 24 until after May 6, 1919, Italy was not represented in the Conference or in the Council, the Italian delegates having withdrawn from the Conference. The "Council" was given the name of "The Council of Three." In the published account of its proceedings appears the following:

The disposition to be made of the former German colonies was decided at the Peace Conference in Paris on May 6, 1919, by the Council of Three—M. Clemenceau, President Wilson and Mr. Lloyd George. . . . The official statement in detail is as follows:

Togoland and Cameroon.—France and Great Britain shall make a joint recommendation to the League of Nations as to their fate.

German East Africa.—The mandate shall be held by Great Britain.

German Southwest Africa.—The mandate shall be held by the Union of South Africa.

The German Samoan Islands.—The mandate shall be held by New Zealand.

The other German Pacific possessions south of the Equator, excluding the German Samoan Islands and Nauru.—The mandate shall be held by Australia.

Nauru (Pleasant Island).—The mandate shall be given to the British Empire.

The German Pacific Islands north of the Equator.—The mandate shall be held by Japan.

On the next day—May 7, 1919—the delegates of the Allied and Associated Powers, assembled at Versailles,

presented the peace treaty to the German delegates for signature.

On the day following, Belgium filed a protest with the Council against the distribution made by the Council of Three, in which it was said:

> In view of Belgium's important military operations in Africa, her sacrifices to insure the conquest of German East Africa, and the fact that her situation has given her rights on that continent, Belgium is unable to admit that German East Africa could be disposed of by agreements in which she had not participated.

The peace treaty was signed by Germany on June 28, 1919.

The statement above quoted, that the Council of Three, before the peace treaty was even presented to Germany, "decided" upon the disposition of the German colonies which was "to be made" is noticeable. It necessarily implies either that the Council of Three, acting as the Council of the Conference, or purporting to act as the Council of "the Concert of Nations," or as the Provisional Council of the League of Nations, was proposing a project of law, or a project of decree, to become a law or decree by action of the Conference in plenary session, or by action of the Conference as purporting to be "the Concert of Nations," or by action of the League of Nations when the League should be formed; or that the "Council of Three" was making a distribution of conquests to be carried into effect by agreement of the parties concerned.

Inasmuch as the distribution followed exactly the plan of conquest and also corresponded exactly with Great Britain's commitments to Australia, South Africa, and New Zealand, and with the understandings between Great Britain, France, and Japan, the act of

the Council of Three was in fact a division of the spoils by the controlling victors, whatever may be the theory on which it is now sought to support it. Belgium's protest shows that it took this view.

It has recently been reported that Belgium's claims have been satisfied by Great Britain ceding to it a part of German East Africa—a proceeding which can be explained only on the theory that Great Britain at least considers itself to hold the full title and sovereignty of the regions allotted to it.

III

In the peace treaty the following disposition of the German colonies is made:

Article 118. In territory outside her European frontiers as fixed by the present Treaty, Germany renounces all rights, titles and privileges whatever in or over territory which belonged to her or to her allies, and all rights, titles and privileges, whatever their origin, which she held as against the Allied and Associated Powers.

Germany undertakes immediately to recognize and to conform to the measures which may be taken now or in the future by the Principal Allied and Associated Powers, in agreement where necessary with third Powers, in order to carry the above stipulation into effect.

In particular Germany declares her acceptance of the following Articles relating to certain special subjects.

Article 119. Germany renounces in favor of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions.

Articles 120 to 127, inclusive, also relate to the German colonies. Sections 120 to 125, inclusive, have for their purpose the elimination of German property and interests, public and private, in these colonies.

Article 126 requires Germany to observe the provisions of the Brussels African Act relating to the trade in arms and spirits in Middle Africa. Article 127 provides that "The native inhabitants of the former German oversea possessions shall be entitled to the diplomatic protection of the Governments exercising authority over those territories."

In Annex VII of Article 244, relating to the transfer of the German submarine cables, it is provided as follows:

> Germany renounces on her own behalf and on behalf of her nationals in favor of the Principal Allied and Associated Powers all rights, titles and privileges of whatever nature in the submarine cables set out below, or in any portions thereof:
>
> Yap-Shanghai, Yap-Guam, and Yap-Menado (Celebes): from Yap Island to Shanghai, from Yap Island to Guam Island, and from Yap Island to Menado.

If it were not for the action of the Council of Three, there could be no doubt that by the adoption of the peace treaty the title and sovereignty of all the German colonies would, under Article 119, be vested in the United States, the British Empire, France, Italy, and Japan, as tenants in common in equal shares, since by Article 119 Germany is required by all the Allied and Associated Powers to renounce all its oversea possessions in favor of the "Principal Allied and Associated Powers," and the five states named are by the peace treaty declared to be these "Principal" Powers.

Article 118, which requires Germany to "recognize and to conform to the measures which may be taken now or in the future by the Principal Allied and Associated Powers, in agreement where necessary with third

Powers, in order to carry the above stipulation [of renunciation] into effect," is exceedingly broad and far-reaching. It may be claimed that the expression "measures which may be taken now" has the effect of importing into the treaty and making final any action relating to the German colonies taken by the Peace Conference at any time prior to the date of the peace treaty, and thus recognizes and imports into the treaty the distribution made by the Council of Three. The argument would be, no doubt, that the action of the "Council of Three" was an act of partition made by the Principal Allied and Associated Powers in expectation of receiving the title collectively by Article 119 of the peace treaty, and that they made this partition in advance in order to carry into effect that article. The expression, "measures which may be taken now," is so unusual and so difficult to understand in this connection unless it refers to the act of the Council of Three, that prudence demands that all doubt concerning what it means or implies should be set at rest before the United States is committed to it.

Were the United States to allow the peace treaty to be given such a construction that the distributive act of the "Council of Three" would be imported into it, it would give its consent to an act which it was not within the constitutional power of the representatives of the United States to do and which would violate its professed plan, accepted by the belligerents, that there should be a "free, open-minded and impartial adjustment of all colonial claims."

The distribution was not free or open-minded, being made in pursuance of secret commitments and understandings, and without reference to the full Conference. If the Covenant permits the British dominions and India to be at the same time members of the League of

Nations as independent states, with full voting powers and the power to be mandatories of the League, and at the same time allows them to be parts of the British Empire in subordination to Great Britain, or federal states in a British Commonwealth under Great Britain as presiding and commanding head, the distribution was not impartial; for by it the British Empire received nearly all that there was to be distributed.

If Japan acquires permanently the islands distributed to it, it will be located between the United States and the whole Orient; its insular possessions will surround the Philippines and Guam; its influence will be extended to a line in the Pacific hundreds of miles nearer the United States; it will command Hawaii, the Panama Canal, and the whole Pacific Coast. In case a properly organized League of Nations should decide that it would be fair to dispose of all Germany's colonies and give Germany no mandate whatever, and in case backward regions not its colonies should be allotted to the various members of the League, the proper mandatory for the Pacific Islands north of the equator would unquestionably be the United States. Nothing should be allowed to check the development of the Philippines along the lines the United States has wisely laid out and successfully followed. No self-denying professions made in its behalf can properly be allowed to interfere with any action having for its object the prevention of the present distribution from becoming permanent. It is the first duty of a state to protect itself and its wards.

JUDICATIVE CONCILIATION

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ON the night of October 21st, 1904, during the Russo-Japanese war, Russian warships, proceeding down the North Sea in a mist, fired upon British trawlers at a fishing ground off the Northumberland coast, called "the Dogger Bank"; sinking or injuring some of these peaceful fishing vessels and killing or wounding a number of British citizens who were members of the crews. The excuse was that the officers of the Russian ships believed that the trawlers were Japanese torpedo boats. After a short period of excitement, during which the incident threatened to bring Great Britain and Russia into war with each other, a process of pacific settlement was agreed upon and a treaty signed embodying this agreement. The treaty recited that the British and Russian governments had "agreed to intrust to an International Commission of Inquiry, assembled conformably to Articles IX to XIV of the Hague Convention of the 29th (17th) July, 1899, for the Pacific Settlement of International Disputes, the task of elucidating by means of an impartial and conscientious investigation the questions of fact connected with the incident which occurred during the night of the 21st–22nd (8th–9th) October, 1904, in the North Sea." (Declaration between the United Kingdom and Russia, relating to the Constitution of an International Commission of Inquiry on the

subject of the North Sea Incident. British Parliamentary Papers, 1905, vol. ciii, p. 361, (Cd. 2328). The document was executed November 25th, 1904.)

The tribunal was to consist of five members—one an officer of high rank in the British navy, one an officer of high rank in the Russian navy; the governments of France and the United States were each to select one of their naval officers of high rank, and the fifth member was to be chosen by these four.

If the treaty had contained no other provision than these, there could have been no doubt that the proceeding was one of "inquiry," as defined by the Hague Convention for Pacific Settlement, since the treaty follows almost exactly the words of Article IX. The words there used as defining the function of a "commission of inquiry" are "to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation." It is true that Article IX recommends a commission of inquiry only in disputes "involving neither honor nor vital interests," but this is clearly a restriction which disputant nations may waive.

But the treaty went farther and conferred on the commission additional functions. Its words were:

"The commission shall inquire into and report on all the circumstances relative to the North Sea incident, and particularly on the question as to where the responsibility lies, and the degree of blame attaching to the subjects of the two high contracting parties, or to the subjects of other countries in the event of their responsibility being established by the inquiry."

The commission was formed, and made a finding concerning both the facts and the liability. The finding was adverse to Russia on the question of responsibility, and largely favorable to Russia on the question of

blame to be attached to the Russian officers. (North Sea Incident. International Commission of Inquiry. Despatch from the British Agent forwarding the Report of the Commissioners. British Parliamentary Papers, 1905, vol. ciii, p. 437, (Cd. 2382). Both parties accepted the finding, and the matter was peacefully and satisfactorily settled.

The case is generally cited by writers on international law as an example of settlement by a "commission of inquiry"; but inasmuch as the commission was given jurisdiction to find the facts and also to render an advisory judgment locating the responsibility and determining the degree of blame, a question arises concerning the nature of the proceeding. Is such a process of settlement properly to be regarded as one of "inquiry" within the meaning of the Hague Convention for Pacific Settlement, or should it be classified under some other heading?

The Convention states (in Article XIV of the original Convention of 1899, and in substantially the same language in Article XXXV of the revised Convention of 1907), that "the report of an international commission of inquiry is limited to a statement of facts, and has in no way the character of an arbitral award," and that "it leaves the conflicting powers entire freedom as to the effect to be given to this statement." While the function of an "international commission of inquiry" is thus apparently limited to making a finding of facts, nevertheless Article X of the Convention states that the agreement of the parties "defines the facts to be examined and the extent of the commissioners' powers." It requires a liberal interpretation of the words "defines the extent of the commissioners' powers" to find in them a warrant for a commission of inquiry making not only a finding of facts, but also a finding regarding

the liability, which is in effect an advisory judgment. However, the treaty above quoted between Great Britain and Russia clearly so interpreted Article X, since it declares that the commission is "assembled conformably to Articles IX to XIV of the Convention," and an interpretation made by the British and Russian governments is entitled to great weight. (The official correspondence relating to the North Sea Incident shows that the draft of the treaty proposed by Lord Landsdowne, in behalf of the British government, stated in the preamble that the parties agreed "that the elucidation of the questions in dispute shall be referred to an International Commission of Inquiry analogous to that provided for in Articles IX to XIV of the Convention," etc., and contained substantially the same language as was finally adopted requiring the commission to report on the responsibility and the degree of blame; that the Russian government, through Count Lamsdorff, proposed a draft with a preamble stating that the commission was to be assembled "conformably to" (*conformément aux*) these articles, and providing that the commission should fix the responsibility; that five days afterwards Count Lamsdorff telegraphed stating that on the advise of Russian jurists (among them M. de Martens) he had come to the conclusion that the provision of the British draft requiring the commission to fix the responsibility and the degree of blame was "contrary to sense of stipulation of Hague Convention relating to appointment of a commission of inquiry"; to which Lord Lansdowne replied, calling attention to the fact that the British draft used the word "analogous" and that the Russian draft had provided for the commission fixing the responsibility, and asserting that it could not "possibly be contended that the question

of responsibility is a question of fact but that the question of blame is not." Lord Lansdowne further said that the opinion of the British government was that the "question of responsibility and question of blame are both questions of fact," and that the word "analgous" was used in the British draft "for greater security in order to meet the kind of objection" raised by the Russian government.

Correspondence relating to the North Sea Incident, British Parliamentary Papers, 1905, vol. ciii, p. 369, (Cd. 2350), Nos. 43, 72, 76, 77, 78.)

This novel and extraordinary proposition of the British government, that questions of responsibility and degree of blame are questions of fact, was evidently advanced as a diplomatic means of solving a difficulty which threatened to halt the negotiations. The correspondence immediately following that above referred to shows that Russia insisted that it would submit the dispute only to a commission of inquiry assembled conformably to The Hague Convention, and Great Britain that it would submit it only to a commission which should determine the responsibility and the degree of blame. Finally a compromise was reached by adding the provision extending the inquiry so as to include an investigation concerning the responsibility of the subjects of other powers; by calling the instrument a "Declaration" and having it signed at St. Petersburg; and by making a joint stipulation before signing that "should the instrument about to be signed prove in any way inconsistent with the stipulations of the Hague Convention included in Articles IX to XIV, the articles of the instrument shall be held to override those of the Hague Convention."

Ibid. Nos. 82, 83, 84, 88, 90.

The proposition that the questions of responsibility and degree of blame are "questions of fact" within the meaning of the Hague Convention seems thus to have been regarded as untenable, and to have been abandoned. The result of the whole correspondence is to leave it doubtful whether the parties themselves regarded the treaty as providing for the process of "inquiry" mentioned in the Hague Convention. Count Lamsdorff well summed up the situation when he said, at the end of the negotiations, that "the views of the two governments are really identical, since the recommendations of the Hague Conference were accepted by both as the basis of the commission of inquiry, while he fully realized the advantage of extending the competency of the court." That is to say, both governments accepted the principle underlying the process of "inquiry" as determined in the Hague Convention, and instead of making the restricted application of this principle which is made by Articles IX and XIV of the Convention, gave it an extended application under the authority of Article X, by an agreement which was also a "Declaration"; thus interpreting the Convention according to its spirit, though contrary to its letter.) If, however, this interpretation is to be adopted, it would seem to be clear that the Hague Convention really makes provision for two kinds of "commissions of inquiry"—a "commission of inquiry" in the strict sense and a commission of inquiry in another sense. It is the purpose of this paper to consider with some care the nature of the process of settlement applied in the North Sea Incident, and the possibilities of the process as a means of settling international disputes.

In the first place, it is to be noticed that the Hague Convention for Pacific Settlement, in Article IX, above

quoted, asserts that the primary function of a commission of inquiry is not merely to find the facts in the case, but "to facilitate a solution" of the "differences." The solution of the differences is to be facilitated "by elucidating the facts by means of an impartial and conscientious investigation." The Hague Convention also states, in Article XIV, above quoted, that the disputants have "entire freedom as to the effect to be given to this statement [of facts]"—that is to say, the disputants are free to accept or reject the action of the commission of inquiry, or to accept it in part. Any dispute, therefore, which is settled by a commission of inquiry is settled by the agreement of the disputants, and the only function of the commission of inquiry is to "facilitate the solution"—that is, to aid the disputants, by conciliation, to settle their differences themselves by their own agreement.

Every commission of inquiry, therefore, has for its primary purpose the conciliation of the parties. It is restricted in its conciliative function to the use of judicative methods. It leaves the parties free to act; and if the dispute is settled, it is their own agreement, induced by the conciliation or not, as the case may be, which settles it. The process called "inquiry" in the Hague Convention may, therefore, it would seem, appropriately be described as a process of judicative conciliation. If the commission merely finds the facts, the process is thus an incomplete process of judicative conciliation. If the commission makes a finding of the material facts and also gives an advisory opinion concerning the liability on the facts so found, it is a complete and perfect process of judicative conciliation.

Judicative conciliation is to be distinguished from either arbitration or the judicial action of a court. A commission of judicative conciliation, whether in the

imperfect form described in Article XIV of the Hague Convention or in the perfect form as manifested by the tribunal in the North Sea Incident, differs from a tribunal of arbitration in this: The finding of facts and the judgment or opinion of a tribunal of judicative conciliation are advisory only, and the parties are free to accept or reject them, so that it is the parties themselves who finally settle the matter by their voluntary agreement; whereas arbitration implies an obligation of the parties to accept and faithfully carry into effect the award of the arbitration tribunal. Article XVII of the Hague Convention places this obligative feature of arbitration beyond doubt, since it states that "the arbitration convention implies the engagement to submit loyally to the award." This characteristic of arbitration was made still more clear in the revision of the Convention for the Pacific Settlement of International Disputes made by the Hague Conference of 1907. In Article XXXVII of the revised Convention it was declared that "recourse to arbitration implies an engagement to submit in good faith to the award."

In political literature dealing with the pacific settlement of international disputes, and in economic legislation and literature dealing with the pacific settlement of collective industrial disputes, there has been until recently much confusion of definition in the use of the words "conciliation," "arbitration" and "mediation." It seems to the writer that the following may be taken as the proper definitions of each of these terms according to the best modern usage:

Conciliation is the interposition between disputants, by their consent or acquiescence, of a third personality, whose function it is to facilitate the solution of the difference in such manner as may be appropriate

to the case, so that the parties may agree upon a settlement.

Arbitration is the interposition between disputants, by their consent, of a third personality, whose function it is to ascertain the facts and to make an award by applying to the facts so found established rules accepted by or agreed upon by the parties and the society of which the parties are members; the parties being obligated to accept the award.

The conciliating or arbitrating personality may be a person, a personality, or a body of persons or personalities, wholly external to the disputants, or (if the disputants are collective persons) partly external to them and partly internal to them, or wholly internal to them. That is to say, the conciliator or arbitrator between disputant nations or other societies may be a third nation or society, an individual who is a foreigner, or a body of individuals all of whom are foreigners; or it may be a body of individuals part of whom are foreigners and part citizens or members of the disputants; or it may be a joint committee composed wholly of citizens or members of the disputants.

Mediation is a species of conciliation distinguished by the fact that the conciliating personality is a person, or a society, or a nation, regarded as co-ordinate or equal in status with the disputants. Thus only a nation can be said to "mediate" between nations. Only a society of the same kind and rank can "mediate" between other societies. Only an individual who is recognized as a social equal can "mediate" between individuals. Conciliation by a personality superior to the disputants, or by an agency of the disputants, is thus never properly to be spoken of as "mediation." This "engagement" or obligation is not only of each of the disputant nations to the other, but of each of them

to the society of nations. Arbitration, therefore, cannot properly be classified as a conciliative process. This essential feature of implied obligation to accept the award, even if it does not require arbitration to be classified as a compulsive process, since the nations are free to arbitrate or not to arbitrate, nevertheless distinguishes arbitration from judicative conciliation.

A commission of judicative conciliation is clearly different from a court. A court is the judicial organ of a society organized compulsively as a state. A court exists and acts under the constitution and laws of the state and has the function of finding the facts in cases duly brought before it and of applying to the finding of facts the principles established by the state as its law. A court implies a legislature and an executive, and a constabulary under their control to enforce the laws, the executive decrees, and the judgment of the court. A court, therefore, is an organ of a society organized on the principle of compulsion, for the purpose of applying compulsion like any other organ of the state. Judicial action and judicative conciliation are, therefore, distinct from each other.

If the reader is willing to grant, for the sake of argument, that there is a distinction between judicative conciliation, arbitration and the judicial action of a court, and that judicative conciliation is also practicable as manifested by the settlement in the North Sea Incident, and in a less perfect way by the various settlements which have been made by the aid of commissions of inquiry in the strict sense, he will perhaps be willing to consider the suggestions made in the following pages concerning the form of organization of the society of nations to which judicative conciliation, as a process, properly belongs, and concerning the use which may be made of judicative conciliation by the

society of nations as a process of pacific (and in a sense, judicial) settlement of international disputes.

First, let us premise that every form of settlement of international disputes which is really pacific is, in the last analysis, not a process of settlement by the parties, but by the society of nations. Every nation which mediates between disputant nations, even by their request, represents the dignity and the advisory influence of the society of nations; so does every commission of inquiry instituted by disputant nations; so does every arbitration tribunal instituted by disputant nations, whether the arbitrators be selected from the Permanent International Court of Arbitration or without reference to the panel of that court; so does every court which sits in a dispute between nations, whether it be a court instituted by one nation, by several nations, by all nations, or by the society of nations. Every process for settling international disputes judicially, therefore, is a process whereby the society of nations acts as a judicative conciliator, or as an arbitrator, or as a judge; and every commission of inquiry or judicative conciliation, every tribunal of arbitration, and every court convened for the settlement of an international dispute, represents in itself the dignity, the advisory influence and the interests of the society of nations.

Assuming it to be granted that all the processes and organs of pacific settlement are really processes of the society of nations, the question arises whether judicative conciliation, arbitration and judicial action are processes of the society of nations conceived of as existing under one single form of organization or are processes of the society of nations conceived of as existing under different forms of organization. It is the opinion of the writer that the latter view is correct.

A careful examination of the subject will, it is believed, result in the conclusion that judicative conciliation is a process of the society of nations conceived of as a purely voluntary and cooperative organization, that the process of judicial action in the strict sense is a process of the society of nations conceived of as a compulsive organization and as a federal state, and that the form of organization of the society of nations to which the process of arbitration ought to be referred will depend on whether the obligation of the disputants to abide by the award is one of honor merely or is enforced by the society of nations.

In order to determine this question it is necessary to consider what is meant at the present time by voluntary or cooperative organization. The principal sources of information on this subject are the reports of commissions on industrial organization and books dealing with the so-called "cooperative movement" in industry and the methods of preventing strikes by bringing about the pacific settlement of collective industrial disputes. A study of the writings on this subject seems to warrant the conclusion that the voluntary or cooperative organization is now accepted as one of the two great forms of organization; the other being the compulsive form. It seems also to be settled that the cooperative form of organization, whether applied in the industrial, the social or the political world, depends upon the coherence of the units, growing out of their perception and belief that it is for their self-interest to cohere. The self-interest of each unit in cohering with the other units arises from their perception of and belief in the principle that humanity is so constituted that each human unit can obtain more for his development and happiness by taking his due share of the result of organized cooperative effort in which

he duly participates than he can possibly obtain by his own isolated and unaided effort, and vastly more than he can obtain by effort directed to competition or other form of struggle or warfare. What is true of the original human unit—the individual—is also true of the derivative and artificial human unit—the nation. If each nation, like an individual, perceives and believes that it can, in the long run, by a primeval, universal and unalterable law of God, obtain more for its development and happiness by taking its due share of the cooperative effort of a cooperatively organized society of nations, than it can possibly obtain by its isolated and unaided effort or by its effort directed towards competition with other nations involving struggle and warfare, it will, as a matter of self-interest, organize itself cooperatively with other nations so that all will form a cooperative organization, and it will cohere with the others in the organization out of its own self-interest. Therefore, the cooperative form of organization is in the highest sense reasonable and practicable.

In the cooperative form of organization, self-interest induces the members to cohere and to perfect the organization as a means of advancing their own self-interest. They therefore settle their disputes pacifically. Not only does the organization and its object of mutual benefit give them a desire to cooperate peacefully and a standard by which they can settle their disputes, but every dispute appears to them as an obstruction to the working of the mutual benefit organization, and therefore contrary to the self-interest of every member. As the result to be obtained in the settlement of disputes is cooperation, and as cooperation implies voluntary action impelled by self-interest, all settlements of disputes in societies which have the cooperative form of organization take place by conciliation.

Cooperative organization is, therefore, based on conciliation, and peace and cooperative organization are synonymous terms. Though, as an exceptional matter, force may be used, it can be used consistently only to the extent that it aids conciliation. Thus, even war between nations may, under some circumstances, be not inconsistent with the cooperative (and therefore peaceful) organization of the society of nations. If it is in aid of conciliation and cooperation, it may be justifiable. The fact that force may thus be used in a cooperative organization does not, however, alter the fundamental principle that all the processes of the cooperative organization of the society of nations, which is the only peaceful form, are conciliative.

If this be granted, judicative conciliation appears as a process of the society of nations conceived of as a cooperative organization, which is, in fact, a cooperative federation of nations. The primary process in the society of nations conceived of as cooperatively organized is, of course, negotiative conciliation. This is manifested continually by the action of secretaries of foreign affairs and diplomats who represent each his own nation and the society of nations in finding a means of settling disputes between nations consistently with the cooperative organization of the society of nations. It is manifested also in acts of mediation of nations between disputant nations. The second process in the society of nations conceived of as cooperatively organized is judicative conciliation. The third process is that of formulating rules of the society of nations to determine future action and relationship between nations, so that they may preserve the cooperative organization and so that the organs of judicative conciliation may have established rules to interpret and apply. This process (which may perhaps be described

as regulative conciliation) is now carried on in various antiquated and informal ways through the writings of publicists, the proceedings of societies of international law, etc. The society of nations, conceived of as a co-operative federation of nations, thus manifests itself through the major processes of negotiative, judicative and regulative conciliation, and is a voluntary organization. The society of nations, conceived of as a state, whether federal or unitary, manifests itself through the major processes of legislation, judication and execution, and is a compulsive organization. Judicative conciliation is, therefore, it would seem, one of the three major processes of the society of nations, conceived of as organized on the voluntary and co-operative plan.

The judicial process of action in disputes between nations, regarded as a process of the society of nations, is, it would seem, clearly to be regarded as a process of the society of nations conceived of as organized into a federal state—that is to say, conceived of as organized on the compulsive and state plan and not on the voluntary and cooperative plan. If this be true, the application of the judicial process in the settlement of international disputes seems to imply, in the long run, not only a federal court of the society of nations, but a federal legislature and executive, together with a federal constabulary as a means of enforcing the federal legislative, executive and judicial action. The process of judicial action in disputes between nations is, therefore, it would seem, properly to be regarded as one of the three processes of the society of nations conceived of as organized compulsively and as a federal state.

The arbitral process in disputes between nations, regarded as a process of the society of nations, seems difficult to classify. It is not a process of the society

of nations conceived of as a purely voluntary and co-operative organization, since the implied obligation of the disputants to the society of nations to accept the award gives it a compulsive quality and makes it impossible to regard it as a conciliative process. Nor can arbitration be regarded as a process of the society of nations conceived of as a federal state, since the federal state does not enforce the obligation of the disputants by its constabulary power, but regards the obligation as one of honor. If the society of nations should ever enforce by constabulary action the obligation of the disputants to abide by the arbitral award, the process of arbitration would clearly be a process of the society of nations organized as a federal state.

It, therefore, seems clear that judicative conciliation and judicial action by courts are processes of two antithetical—or, perhaps, complementary—forms of organization, and that the use of judicative conciliation in the pacific settlement of disputes between nations implies that the society of nations is a voluntary and cooperative federation of nations; whereas the use of judicial action of courts implies that the society of nations is a federal state, of which the nations are member-states. If both these processes were used by the society of nations, it would seem necessarily to imply that its organization was one of a mixed form—partly that of a cooperative organization and partly that of a federal state. It is perhaps on account of the ambiguity of the process of arbitration as referable either to one form of organization or the other that it has become so well established. An ambiguous process which some may regard as voluntary and others as compulsive seems to fit the present situation, in which some contend that the society of nations is a voluntary and cooperative society and others that it is a compulsive and federal state.

The question then arises whether those interested in international political science should not study and promote judicative conciliation, as well as arbitration and strictly judicial action. As has been said, an arbitral tribunal, though in most respects voluntary and conciliative, is in one respect obligatory and compulsive, since nations which agree to arbitrate thereby bind themselves in honor to each other and to the society of nations to accept the award, whether they believe it to be just or unjust, and whether or not they believe they are violating their own proper self-interest and the interest of the society of nations in so doing. Nations are cautious about so submitting to an external judgment, and therefore arbitration may, in the long run, possibly be found to be useful principally for settling disputes between nations which are of minor importance. A court of the society of nations would seem to imply a compulsive form of organization of the society of nations and to involve, in the long run, the transformation of the society of nations into a federal state in which the nations would be member-states, with a federal legislature, executive and constabulary in addition to the federal court. This seems clearly to be beyond the range of practical politics, even if its desirability should be granted. Undoubtedly so far as the society of nations can be said to have any organization, or any constitution, at the present time, the prevailing principle of that organization is cooperation through the wholly voluntary coherence of the nations, based on the perception and belief that it is for their self-interest to cohere and cooperate. The society of nations thus conceived of as existing exercises, and is expected by the nations to exercise, only an advisory influence, conciliating the nations by its advice given through organs which it constitutes or sanctions. It would seem wise,

therefore, to study the imperfect conciliative processes of the present cooperative federation of nations with a view to perfecting them, having in mind that it may be found necessary to relegate arbitration to the position of a minor and subsidiary process of pacific settlement, and to postpone the plans for the establishment of a court until it shall become evident that the nations of the world are ready to form themselves into a federal state and provide themselves with a federal legislature and executive, as well as a federal court, and with a federal constabulary to enforce the federal laws, the federal executive action and the judgments of the federal court. Such a study would involve the acceptance of judicative conciliation as a major process of the cooperative organization of the nations, and this process would be studied along with the other two major processes of negotiative conciliation and regulative conciliation.

Even through the gloom which the present war has cast over the whole world we see cooperative organization—now partly turned to war uses and partly directed toward peaceful control of the material and human forces of the universe to the mutual benefit of the nations and their people—making wonderful progress everywhere. In the industrial world, before the war, cooperation already had become firmly established. Great industrial societies and groups were organized in all the nations on the voluntary and cooperative basis and settled their disputes by conciliative processes through conciliative organs. Each progressive nation itself cooperated in the cooperative industrial organization and sanctioned and encouraged, or instituted, all kinds of processes and organs of conciliation. After the war, it seems far more likely that the principles of cooperative organization will extend them-

selves into the society of nations and convert that society into a more perfect cooperative union, than that the nations will dissolve their present imperfect cooperative organization and revert to a mere aggregation of competitive, struggling and warring units. Their self-interest in cooperation, seen more clearly as the result of the great war, will drive them, it may reasonably be hoped, to more perfect coherence and cooperation through processes and organs of conciliation instituted or sanctioned by the will and judgment of all of them assembled in general conference.

In what has been said it has not been the purpose to speak dogmatically and to advocate any diminution on the part of the members of the Society for Judicial Settlement of International Disputes in the pressure for the settlement of international disputes by arbitration, or to weaken the enthusiasm of those members who demand the establishment of a court of the society of nations. Arbitration is an established process. If nations can settle their disputes peaceably by arbitration, by all means let us encourage them to do so. If a court of the society of nations can be established without converting the society into a federal state, or if we believe such conversion is practicable and desirable, let us press for the establishment of the court. All that is intended to be said in this paper is that in the great work of promoting the judicial settlement of international disputes we should not overlook the possibilities which lie in judicative conciliation, both in its imperfect form of "inquiry" under the definition of Article IX of the Hague Convention for Pacific Settlement and in its perfect form of judicative conciliation as manifested in the settlement of the North Sea Incident. It is always wise to hold fast to all that has proved itself good in many instances; therefore, we

must hold fast to arbitration. It is also wise sometimes to plan for a revolutionary change. Therefore, we may plan for a court of the society of nations; though the burden is in that case on us. But it is certainly also wise to hold in mind and consider carefully that which has proved good even in one case; for it may be that, if carefully studied and more generally applied, it will be found useful in many other cases.

THE PROPOSED CODIFICATION OF INTERNATIONAL LAW AND THE RELATION OF CODIFICATION TO THE PROPOSED ESTABLISHMENT OF A SUPREME INTERNATIONAL COURT OF ARBITRAL JUSTICE

THE PROPOSED CODIFICATION OF INTERNATIONAL LAW AND THE RELATION OF CODIFICATION TO THE PROPOSED ESTABLISHMENT OF A SUPREME INTERNATIONAL COURT OF ARBITRAL JUSTICE

Address delivered at the Annual Meeting of the American Society of International Law, held at Washington, April 27–29, 1911.
Reprinted from the proceedings of the Society for the year 1911.

THE proposal to establish a supreme international court of arbitral justice, and the accompanying proposal to codify international law, bring up, as a preliminary consideration, the question whether international law, so-called, is true law, in the sense in which the word "law" is used in the science of jurisprudence; and if so, what is its nature and scope and its relation to other law. A court of justice implies the existence of law. Codification involves a scientific arrangement of principles which have been formulated in precise language and which have been established as laws. When we use the word "court" and "codification" we are using terms of jurisprudence. We cannot establish an international court or codify international law unless we can first establish the proposition that international law, so-called, is true law. It becomes necessary therefore to consider the requirements which are necessary in order that a body of rules may be law, in the sense of the science of jurisprudence.

Professor Holland says, in his book on *Jurisprudence*

(11th ed., pp. 88, 89. The first sentence of the quotation is transposed, but the meaning is not changed):

> Law is formulated and armed public opinion, or the opinion of the ruling body. . . . The real meaning of all law is that, unless acts conform to the course prescribed by it the State will not only ignore and render no aid to them, but will also, either of its own accord or if called upon, intervene to cancel their effects. The intervention of the State is what is called the "sanction" of law. . . . [Law] defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, it is "substantive law." So far as it provides a method of aiding and protecting, it is "adjective law" or procedure."

Also he says (page 80):

> Law is something more than police. Its ultimate object is no doubt nothing less than the highest well-being of society, and the State, from which law derives all its force, is something more than a "Rechtsversicherungsanstalt" or "Institution for the protection of rights" as it has not inaptly been described.

A law—that is, a particular law, as distinguished from the whole body of law of a political society—Professor Holland defines (page 42) as "a general rule of external human action enforced by a sovereign political authority."

Rules of human action "enforced by indeterminate authority," that is, enforced by the censure of general public opinion, or by the censure of the opinion of a given political society, fall, according to Professor Holland (page 28), within the domain of the science of nomology, but not within that of the science of jurisprudence. "Rules set by [a sovereign political au-

thority]," he says (page 41), "are alone properly called 'laws.'"

The process of formulating law proceeds in two general ways, according as the given political society holds one notion or another of its relations with the past. A political society may abide by custom, and set up as its government a judicial body—not necessarily representative of territorial districts—which will investigate and ascertain usage, will determine when usage has grown into custom, will adjudicate whether the custom is "reasonable" or not, will formulate reasonable custom in terms of law, and will place the stamp of authority upon such formation and make it law. On the other hand, a political society may disregard customary modes of action and relationship, and set up a legislative body— usually representative of territorial districts which will formulate new rules—statutes —by deliberative methods. Political societies in fact exist generally under law which is in part customary and in part statutory, customary law being superseded by statutory law in case of conflict between them. As Professor Holland says (pages 60, 62):

> The State, through its delegates the judges, undoubtedly grants recognition as law to such customs as come up to a certain standard of general reception and usefulness. To these the Courts give operation, not merely prospectively from that date of such recognition, but also retrospectively; so far implying that the custom was law before it received the stamp of judicial authentication. . . . The legal character of reasonable ancient customs is to be ascribed, not to the mere fact of their being reasonable ancient customs, but to the existence of an express or tacit law of the State giving to such customs the effect of law. . . . [The State] sometimes in express terms denies [customs the force of law], and sometimes limits the force which has hitherto

been ascribed to them. In some States greater force has been allowed than in others to customs as compared with express legislation.

From Professor Holland's analysis, it is to be concluded, that there are three elements which must exist in order that there may be law in the sense of the science of jurisprudence; first, a body of persons on a definite territory living together in an organized political society, free from all control or free from control other than that of the society of nations; second, a definite body of persons within the society who authoritatively formulate into rules the existing customs of the society or who authoritatively formulate new rules for current exigencies without regard to custom, or who perform both functions; and, third, a definite body of persons within the society who authoritatively enforce the rules so formulated.

The question arises whether or not international law so-called, conforms to these requirements, or whether we must exclude international law from the science of jurisprudence, and treat it as a part of the more inclusive science of nomology. In the latter case, we shall be logically compelled to discontinue the use of the expression "international law," and to substitute for it the expression "international moral rules"; for in this view there is only a body of rules which the nations as isolated units follow as governing their contacts or conflicts, and which are enforced by indeterminate authority, that is, by the censure of public opinion; moreover, it will be logically necessary that all international organization shall take the form of popular education and political propaganda, in order that the popular censure may be rightly directed. This, it is to be feared, will lead to excommunication or boycott. Should this be the case, there will arise inter-

national hatred, malice, conspiracy, and secret warfare, the inevitable results of excommunication which will be likely to lead to international political chaos. Every consideration of expediency and justice favors, it would seem, the bringing of international law into the realm of jurisprudence, if that be reasonably possible. Indeterminate rules, enforced by an indeterminate authority, tend, in the long run, to create disorder and war.

It seems that, looking at the facts of the political life of the world, it is reasonable to say that international law, at the present moment, does in fact conform to the requirements which Professor Holland so ably lays down as essential to the conception of true law. Take the first requirement, that there must exist a definite organized political society. A political society exists when its people recognize themselves as united in a society; and it seems wholly consistent with actual facts to say that the peoples and nations of the world are, by the necessity of the case, and by their recognition of their political unity, united at the present moment in a political society which is known as "the society of nations;" that this political society exists under an unwritten constitution and a general law; and that that which we call international law is in fact at the present moment a supreme law emanating from the people and nations of the society of nations.

Professor Westlake, in his *International Law*, says (Part I, Peace, Ed. 1910, pp. 1, 6, 7):

> International law, otherwise called the law of nations, is the law of the society of states or nations. . . . When international law is claimed as a branch of law proper, it is asserted that there is a society of states sufficiently like the state society of men, and a law of the society of states sufficiently like state law, to justify the claim, not on the ground

of metaphor, but on the solid ground of likeness to the type. . . . States live together in the civilized world substantially as men live together in a state, the difference being one of machinery, and we are entitled to say that there is a society of states and a law of that society, without going beyond reasonable limits in assimilating variant cases to the typical case.

The second requirement, that there should be an authoritative formulating body within the society, seems at first glance to be an insuperable obstacle to considering international law as true law. When, however, it is considered that the society of nations is of a composite and federalistic character, being made up not only of the peoples, but also of the nations of the world, the difficulty begins to resolve itself. Such a composite political society may evolve a supreme law without having a specially designated formulating body; for it may be so constituted that there may be an informal drafting process, and that the component states or nations may place their separate confirmation and authentication upon the rules formulated, until there comes about a formulation which is approved by the general consensus of them all. The formulation of the law of the society of nations seems to take place in this manner. A drafting process occurs through the writings of scholars, and through the briefs and notes of diplomatic officers, and the rules thus formulated are confirmed and authenticated by the separate nations by acting upon them in cases where they are applicable. By the treaties and arbitrations of the nations, and by international conferences, even sometimes by war, there arises a consensus upon a certain formulation and that formulation becomes a law of the society of nations.

The nations in this process may, it would seem, properly be conceived of as the judicial agents and delegates

of the society of nations for ascertaining and declaring the customary law of the society, or as an informal legislature of the society. All or the greater part of the law of the society of nations is undoubtedly customary, and treaties, arbitral and judicial decisions, international conferences, and all forms of diplomatic settlement are parts of the formulating and authenticating process by which the laws of the society of nations are evolved, and given the sanction of the society.

The third requirement, that there should be a definite body of persons within the society to enforce the law, is, it seems, complied with also by the fact that the nations are the component units of the society of nations. By their armed forces, they enforce the law of the society of nations as the authorized agents and delegates of the whole society for this purpose.

It seems, therefore, that we may conclude that that which we call international law is really the law of the society of nations, and that it is true law, in the sense of jurisprudence.

If this be granted, it follows that, as the society of nations is of a composite and federalistic character, the law of the society of nations must be federalistic in character, that is to say, that it must relate to those matters which are external to each nation and of common interest to all the nations, or which are beyond the competency of the single nations.

If this be so, the present classification of international law into divisions and headings will be much altered. The present classification dates from the period when international law was conceived of in terms which really made it nothing but the usages of isolated nations, usages which every nation was free to follow or not according to its own mere will and without giving any

reason or explanation. In those days, the primary conception of international law was of each nation as a political unit isolated from all the rest, instead of as a component unit of a society of nations. Hence all classification began with the idea of each nation as independent of and equal with every other, those communities which were under the control of a nation though not partaking of its political life being regarded as non-existent for international purposes or as merged in the international personality of the "sovereign" nation. From such a conception it inevitably followed that international "law" dealt with the contracts or clashings of political units which, desiring to live as hermits, found themselves forced into contact or conflict with other units of equally unsocial aspirations. In text-books of international "law," after the independence and equality of nations had been sufficiently elaborated ,the authors proceeded to consider the questions of unsocial contact and the means of settling the questions growing out of such contact by diplomatic adjustment, by treaty or by arbitration. Lastly, the subject of war was considered, as the means of working off the humors of mutual unsociability or preventing that unsociability which took the form of forcible aggression.

From the study of the evolution of political societies which has been made by various authors during the past half century, it is evident that the society of nations has gone through the same process as has often taken place with respect to families and clans, until it has finally reached a political unity. The process seems in general to be this: The patriarchal or clan community tends to isolate itself. A number of such communities, though living near to one another, at first have no common law and no law for their common

purposes. They fight when they come in contact, or settle their disputes by some rude form of arbitration. As these communities increase in size and number, the contacts become more frequent, and, to avoid incessant fighting, they settle more and more disputes by agreement or arbitration. A settlement made in one case tends to be followed in another similar case, and usage begins. Then this usage becomes so frequent that it is followed generally and as a matter of course. The usage thus becomes a custom. Finally the families or clans become so intimately associated with one another that they begin to recognize themselves as forming one united society and to think of the customs which have been established as laws of the society, that is, as laws emanating from the people of the society as an organized unity. It soon becomes important to have the customs formulated and written down, and persons more or less authorized by public sentiment begin to formulate them. Then a tribunal is instituted to ascertain the customary law and to formulate it and apply it to particular cases. Then, as it is not fair that some should obey the law and others not, the society institutes a law-enforcing body and arms this body so that it may compel all to comform to the customary law. Soon the customary law is found inadequate to cover all cases or to be violative of ethical principles, and the society institutes tribunals with equity powers, that is, with power to apply ethical standards to customs and to nullify those which are unreasonable, and to infer a custom, where there is no actual custom, by considering customs established in analogous cases and applying the principles of right and wrong as determined by the reason and conscience of religious and educated men. Then the society establishes a law-making and law-changing body, which can disregard and nullify,

if it sees fit, the customary law, and which can, if it sees fit, disregard ethical standards. Finally, even this body is subjected to ethical standards formulated as a part of the customary and universal law and applied by the courts or other suitable tribunals.

There can be no doubt that the nations of the world have progressed to the point where they recognize themselves as living under customary rules, enforced by the censure of public opinion. There is good reason to believe that they have progressed beyond this stage, and that, while preserving the idea of independence and equality, they tend more and more to recognize themselves as member-nations of the society of nations. The movement for an international court of arbitral justice is a recognition of the need of an authoritative body for formulating the customary law of the society of nations, subject to confirmation, authentication and enforcement by the nations. Whether the society of nations will find it necessary to establish a law-making body, or even any law-formulating body, other than the Hague Conferences, and whether it will ever establish a law-enforcing body, may well be doubted. It may well be that for such a society a customary law may prove the strongest, because the most elastic bond of union, and that the ultimate central body will be a supreme court whose action in formulating the customary law will not be final, but will be subject to confirmation, authentication and enforcement by the nations.

If international law be thus regarded as the law of the society of nations, dealing with matters external to each state and common to all or beyond the competency of the units singly, and hence as federal in its nature, it becomes necessary to distinguish this kind of law from national law on the one hand and from what may per-

haps be called "the supreme universal law" on the other. Every one understands what national law is, and every American, accustomed to the distinction between State law and Federal law, perceives the distinction between national law and the federal law of the society of nations. But the conception of "supreme universal law," though distinctly American and indeed the basic idea of all American political and legal institutions, is not yet familiar even to American students. To illustrate: By the Fifth and Fourteenth Amendments to the Constitution of the United States, every court within American jurisdiction, even the court of a justice of the peace, is recognized as having authority to disregard any governmental action whatsoever which deprives the individual of his life, liberty or property without due process of law. If the court does disregard governmental action on this ground, the case may go on appeal to the Supreme Court of the United States; and if that court is of opinion that the governmental action in question deprives the individual of his life, liberty or property without due process of law, the governmental action in question, even though it be the action of Congress, is nullified. This is American law, formulated in amendments to the Constitution of the United States; but we do not hold it as law merely because it is a part of the Constitution. It can be proved historically that the Constitution in this respect is regarded by us as declaratory of the supreme universal law. These rights "life, liberty, and property" which the Constitution secures against infringement by governmental action, are the fundamental rights of self-protection and self-preservation, corresponding to those attributes of life, motion, and prehension by which all men are equally endowed by God, and the use of which is equally needful for every human being

for his self-protection and self-preservation. The underlying principle of Magna Charta was, that society exists and governments are instituted primarily to secure these universal and fundamental rights and that hence the powers of all governments are limited by these fundamental rights of the individual. In the time of Coke, these fundamental principles of law were formulated in the words of our Constitution, and English judges asserted that the English courts had jurisdiction, under this law, as a supreme universal law, to disregard and nullify all governmental action in violation of the fundamental rights of the individual. But English public opinion, in view of the military and economic exigencies of England, failed to sustain this view, and the action of the English Parliament was recognized as supreme in England, through the fiction that it was a high court. In the American Revolution, America relighted the torch of progress which had been extinguished in Great Britain. The Continental Congress, in the Declaration of Independence, answered Great Britain's claim of legally-unlimited power over the Colonies by asserting that there are fundamental rights of the individual under the supreme universal law, that society exists and governments are instituted primarily to secure these rights, and that by this law the powers of Great Britain and of every nation and government were and are legally limited. The Civil War was fought by the North to uphold this supreme universal law, and after the war the principle that throughout American jurisdiction no person should, by any governmental action, be deprived of his life, liberty, or property without due process of law, was formulated in the Constitution and was thus made a part of the supreme law of the land which all courts are bound to enforce.

If, therefore, the society of nations is to be consistent with the American political ideas, it must recognize itself as existing under this supreme law, as distinguished both from international law and national law. If courts are established by the society of nations to ascertain and apply the law of the society, or if one such court is established with supreme judicial powers, it must be understood that over and above the law of the society of nations, which is supreme over national law, there exists a supreme universal law by the terms of which all courts are entitled to disregard, and in effect nullify, all governmental action involved in suits duly pending before them, even national laws or acts, or the laws or acts of a group of nations, or the laws or acts of the society of nations, which violate the fundamental rights of the individual. Indeed, as a prerequisite to the establishment of an international supreme court or the codification of international law, it would seem most desirable that there should be formulated a "constitutional bill of rights" (as Americans say) of the society of nations, which would safeguard the international supreme court in the performance of its duty to disregard and nullify any governmental action which should violate the fundamental rights of the individual.

The following tentative "Suggestions concerning a system of division and classification of the principles of International Law regarded as the Federal Customary Law of the Society of Nations," will illustrate the system of classifying the principles of international law, which it will be necessary to adopt if the views above expressed should be accepted:

Suggestions concerning a system of division and classification of the principles of International Law regarded as the Federal Customary Law of the Society of Nations.

PART I. ORGANIC PROVISIONS

CHAPTER I.

The names and boundaries of the component Nations forming the Society of Nations.

CHAPTER II.

Character of the component nations.

(a) Independence.
(b) Equality.

CHAPTER III.

Admission of new members into the Society of Nations.

(a) Declaration of Independence, by non-national communities, and recognition by the nations.
(b) Division of nations by agreement and acquiescence by the other nations.
(c) Junction of nations by agreement and acquiescence by the other nations.

CHAPTER IV.

States having a qualified membership in the Society of Nations.

(a) Protected states.
(b) Neutralized states.
(c) Supervised states.

CHAPTER V.

States having membership in the Society of Nations through a delegate Federal Government or a delegate Nation.

(a) Member states of federal states.
(b) Self-governing colonies of nations.
(c) Partially self-governing colonies of nations.
(d) Non-self-governing colonies of nations.
(e) Communities on reservations and under tutelage.
(f) Communities within the sphere of influence of a nation.

Chapter VI.

Participation in the Franchise and Governmental Power of the Society of Nations.

(a) Civilized nations as participants in the political life of the society of nations.

(b) Partly civilized and barbarous nations as participants in the political life of the society of nations.

Chapter VII.

Expansion or Contraction of Nations with the acquiescence of the Society of Nations.

(a) By cession or annexation of territory and population, without incorporation.

(b) By cession or annexation of territory and population, with incorporation.

Chapter VIII.

Relations between the Nations and the Society of Nations.

(a) Reservation to the nations of all powers which are not necessary to be exercised by the society of nations for the general welfare.

(b) The society of nations the disposer and regulator of those things, activities and relationships which are beyond the competency of any particular nation and in which all have an interest.

Chapter IX.

The Law-formulating and Law-authenticating Agents of the Society of Nations. (Acting for the Society of Nations by implied delegation.)

(a) Diplomatic agents of nations.

(b) Treaty-making officials and bodies.

(c) Foreign departments of nations.

(d) International arbitral tribunals having diplomatic powers.

(e) Conferential bodies of delegates of nations.

(f) National courts sitting as international courts (applying international law).
(g) International courts.
(h) National executives (by message or proclamation).
(i) National legislatures (by declaratory act).

Chapter X.

The Law-enforcing Agents of the Society of Nations. (Acting for the Society of Nations by implied delegation.)

(a) National executive officials and bodies acting as delegated executives of the society of nations.
(b) National armies acting as armies of the society of nations.
(c) National navies acting as navies of the society of nations.

Chapter XI.

The nature of the Law of the Society of Nations.

(a) The law of the society of nations as customary law.
(b) The law of the society of nations as statutory law.
(c) The supremacy of the statutory over the customary law.

Chapter XII.

Supremacy of the Law of the Society of Nations over National Law.

(a) The law of the society of nations, the supreme law of the land throughout the society of nations, and hence supreme, for the common purposes, over national law.

Chapter XIII.

Supremacy of the Universal Law.

(a) The principles of universal law securing the rights of the individual to religious freedom, and to life, liberty, and property as against all governmental ac-

tion, supreme over the law of the society of nations, national law, and all other law.

Chapter XIV.

International Faith and Credit.
(a) Between civilized nations.
(b) Between uncivilized nations.

PART II. REGULATIVE PROVISIONS.

RIGHTS.

Chapter I.

Rights of individuals against governments under the supreme universal law (which forms part of the law of the Society of Nations as of all other law).

(a) That neither the society of nations nor any nation shall prohibit the worship of God, or unduly regulate religious practices not violating private rights or the public peace and order.
(b) That neither the society of nations nor any nation shall deprive any person of his life, liberty, or property without due process of law, or impair the obligation of contracts.

Chapter II.

Rights of the Society of Nations against the Nations.

(a) The right of the society of nations to settle disputes between nations.
    1. Arising under treaties.
    2. Arising out of national tortious acts.
    3. Arising out of conflicting boundary lines.
(b) The right of the society of nations to regulate the common property of all.
    1. Navigation of the high seas and the upper air.
    2. Pelagic fishing and hunting.
    3. Piracy on the high seas or in the upper air.

(c) The right of the society of nations to regulate internationalized persons, property, land, or water.
   1. Regulation of the Hague Tribunal and Red Cross officials and employees.
   2. Regulation of Red Cross ships and supplies.
   3. Regulation of the International Court and Tribunal property.
   4. Regulation of internationalized rivers, channels, or canals.

(d) The right of the society of nations to intervene in the inner life of nations or countries to end anarchy and establish just government.
   1. Joint intervention by several nations in behalf of the society of nations.
   2. Intervention by the nearest or most interested nation in behalf of the society of nations.

Chapter III.

Rights of Nations against Nations, each in its own right.

(a) The right to national life and liberty.
   1. Intercourse between citizens of different nations.
   2. Trade between citizens of different nations.

(b) The right to national property.
   1. National territory.
   2. Territory gained by accretion.
   3. Territory gained by peaceable occupancy and prescription.

(c) The right to the performance of contracts.
   1. Binding force of treaties.

Chapter IV.

Rights of Nations against States which are not full members of the Society of Nations, and *vice versa*.

(a) Protecting nations and a protected state.

(b) Concerts of states and neutralized states.

Chapter V.

Rights of Nations against external communities not members of the Society of Nations, and *vice versa*.

(a) Nations and their colonies.
(b) Nations and native communities on reservations.
(c) Nations and aboriginal communities within a sphere of influence.

Chapter VI.

Rights of Nations as representatives of their citizens against other Nations in their own right, and *vice versa*.

(a) Alienage as determined by citizenship of birth or by citizenship of naturalization.
(b) Breach by nations of their contracts with aliens.
(c) Tortious acts by nations against aliens.
(d) Breach by aliens of their contracts with nations.
(e) Crimes committed by aliens.
(f) Admission of aliens.
(g) Expulsion of aliens.
(h) Civil rights and duties of resident aliens.
(i) Political rights and duties of resident aliens.
(j) Extradition of aliens.
(k) Extradition of citizens.

Chapter VII.

Rights of Nations as representatives of their citizens against other Nations as representatives of their citizens.

(a) Contracts between citizens of different nations.
(b) Tortious acts by citizens of one nation against citizens of another nation.

REMEDIES.

Chapter I.

Remedies of Nations against other Nations, each acting in its own right.

(a) Arbitration by a specially constituted tribunal.

(b) Arbitration before the Hague Tribunal.
(c) Decision by an international supreme court.

CHAPTER II.

Remedies of Nations as representatives of their citizens against Nations in their own right.

(a) Decision by tribunals of the defendant nation.
(b) Arbitration by a specially constituted tribunal.
(c) Arbitration before the Hague Tribunal.
(d) Decision by international courts.

CHAPTER III.

Remedies of Nations as representatives of their citizens against other Nations as representatives of their citizens.

(a) Decision by tribunals of the defendant nation.
(b) Arbitration by a specially constituted tribunal.
(c) Arbitration before the Hague Tribunal.
(d) Decision by international courts.

CHAPTER IV.

Procedure in International Cases.

(a) Procedure in filing and prosecuting claims before departments of national governments.
(b) Procedure in specially constituted tribunals.
(c) Procedure in the Hague Tribunal.
(d) Procedure in international courts.

CHAPTER V.

Execution of International Laws and Judgments.

(a) By separate or joint national armies or navies acting as a delegated constabulary of the society of nations.

CHAPTER VI.

Methods of using Armed Forces, when resistance is made to execution of International Laws and Judgments.

(The laws of war and of neutrality.)

If the society of the nations shall thus recognize itself as a federal political society under a customary federal law, which rather requires psychological than political action, since the society of nations exists when the mass of mankind recognize its existence, we may conclude, as it would seem, that the proposed international court of arbitral justice is necessary and desirable, and that codification of international law, that is, authoritative codification, is not necessary and probably not desirable.

The international court of arbitral justice would be the court of last resort in all cases arising under international law involving rights of the citizens of the nations, and might be given original and even exclusive jurisdiction of cases arising between nations where each sues in its own right and not as representative of its citizens. In some cases it might be proper that the defendant nation should reserve the right to decline to appear. Such right to decline to appear in the Supreme Court of the United States is reserved to the States of the American Union when they are sued by citizens of other States.

Codification of international law, always understanding by codification authoritative codification, seems necessarily to imply a temporary or a permanent legislature of the society of nations. A temporary legislature which should convert the customary law of the society of nations into statutory law and then disappear would leave behind an unchangeable law, which is always an obstacle to reasonable and rightful evolution. A good rule to-day may, in the course of evolution, become later on a bad rule. A permanent legislature of the society of nations would necessarily be on the representative basis. The representative system has never yet been sucessfully applied except in a homogeneous civilized community on a territorial unity.

Communities which are separated from each other, or which, though contiguous, are psychologically diverse, have never yet been successfully held together by a representative legislature, and it seems probable they never will. For the separated and diverse nations, a common supreme customary law, federal in its nature, formulated from time to time on ethical principles by all the existing agencies of diplomative settlement and international conference and by the proposed supreme international court, confirmed by the consensus of the nations, and enforced by the nations, seems likely to be the most efficient bond of union.

THE LAW OF NATIONS

THE LAW OF NATIONS

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AFTER the Reformation, when Europe divided itself into a number of separate states, each claiming to be an independent nation, the necessary contacts between them led to frequent wars. The question arose how to bring about a concert of action between them, which should result in peace and order. All that could be done by agreement was done. But it was clear that peace and order were constantly imperilled so long as the settlement of the questions constantly arising out of these necessary contacts was dependent upon treaties, because at any time on slight pretext these might be rescinded. It was perceived that the only assurance of peace and order among nations, as among individuals, lay in the establishment of a law governing the actions and relations of the nations. Publicists therefore set themselves to the task of formulating and establishing such a law.

In laying the foundations, they naturally looked to the great political concepts of their past and present. First, there was the original Roman Empire, which had expressed itself through the civil law. The political principle of that empire was that, though all power was theoretically vested in all the people of the empire regarded as a single political society, the whole society had delegated all its power to the Emperor, who,

through organs selected theoretically by himself, imposed law, as a supreme political personality representing the whole empire, upon all the persons and bodies politic and corporate within the empire. Second, there was the Christian society of the early Church which based itself upon the teaching of Christ and the Apostles, and which was in part theocratic and in part democratic and republican. This society included all professing Christians regardless of the political jurisdiction in which each found himself; it exercised no political control over its members, but only a spiritual oversight of them. Third, there was the Holy Roman Empire, which expressed itself in part through political compacts between the component states, and in part through the canon law. Its principle was that the various great communities of Continental Europe, as independent states, had delegated power for the common purposes to the Emperor and Diet, subject to a moral or quasi-legal control by the Papacy for the protection of the individual as a member of the Church; the Emperor and Diet, and the Papacy, thus constituting a dual federal head, for the common political purposes and for establishing uniformity in religious practice, of a federation composed of the states of Continental Europe—the British Islands remaining outside the federation and the states of Northern Europe participating in it in a half-hearted manner. To these conceptions of an organized society regardless of or inclusive of states and superior to states and persons for all or some purposes, was opposed the conception, which became prevalent after the Treaty of Westphalia, of the civilized world as composed of a body of states wholly independent and only morally bound by such agreements as they might choose to make, for such time as they might choose to keep them; or at least so far

independent as to be subject in their external relations to no law except that of natural reason and justice, each one interpreting this natural reason and justice according to its own ideas.

Out of these various conceptions, the publicists of the Reformation evolved what they called the law of nations, based in part upon the *jus gentium* of the original Roman Empire, in part upon the federal law of the Holy Roman Empire, and in part upon history and precedent; and what they called "the law of nature," based in part upon the *lex naturæ* of the lawyers of the original Roman Empire,—which was based on reason and conscience,—and in part upon the moral and political philosophy of Christ and the Apostles.

The weakness of the argument of the publicists of the Reformation lay in the fact that they were unable to point out any inclusive organized society or any other personality as the law-giver for the nations. The Reformation was partly political and partly religious. As a political movement, it had for its object the dethronement of the Emperor and the Pope as the dual government of a political society which included most of the civilized world. Upon their dethronement, this inclusive society disintegrated. The old system was so unpopular that no attempt was made to reorganize the society of the European states under a new and better form of government. The world had not advanced to a point where this was possible. The only conception of a society inclusive of and superior to the nations which remained after the Reformation was that which Christ had announced. But this was spiritual, not political; and it was universal, not European. Though the Christian philosophy thus kept alive the idea of an all-inclusive society as the law-giver of the nations, it afforded

no basis for a practical realization of such a society as a political fact.

Because the publicists of the Reformation were thus unable to point to a law-giving personality for the nations, they failed to show the existence of a law governing the nations. They and their successors, however, succeeded in convincing the world that such a law ought to exist and that it was practicable to formulate it. Nations began in fact to abide by and enforce some of the principles formulated by the publicists, but each nation continued to insist that it was its own law-giver. There were thus certain points of agreement between the nations which had some outward semblance to laws governing the nations. In 1780 Jeremy Bentham invented the expression "international law," which so nearly expressed the existing fact that it was soon seized upon by politicians and publicists and came into general, though not universal, use. (This expression was used in his essay on *The Principles of Morals and Education.*)

As we are now able to see, the term "international law" is self-contradictory and therefore unscientific. That which is international cannot be law; or, what is the same thing, that which is law cannot be international. Agreements, relationships, commerce may exist between nations and thus be international; but law can never so exist. Law always and inevitably comes from above. Morality may come from above or from within. Agreements are related to law only as one of the means of establishing law. An agreement permanently to observe a rule in a specified set of circumstances establishes the rule as a law between the agreeing parties; but the rule is the law, not the agreement; and if the principle agreed upon be a true principle of justice, the agreement establishing the rule is

justly irrevocable, and is *functus officio* as soon as made. The only adjective which can appropriately be used with "law" to express the idea of a law governing the nations is therefore "supranational" or "supernational." In an article on "The Primary Sources of International Obligations" printed in the *Preceedings of the Fifth Annual Meeting of the American Society of International Law, held at Washington, D. C., April 27–29, 1911*, pp. 280–289, Professor William L. Hull suggested a distinction between "the law of nations, or extranational law; the law between nations, or international law; and the law over nations, or supranational law." Extranational law he defined as "a composite photograph [or] an amalgamation of national interpretations of international law"; international law as "a collection of the rules in force between pairs or groups of nations"; and supranational law as "a body of law so universal in scope, so expressive of the genius of the family of nations as a whole, that it may serve as a basis for a genuine international court of justice." The terms "extranational law" and "international law," as defined by Professor Hull, seem to the author to be correct, since "law," in the sense in which that word is used in the science of jurisprudence, always comes from "above" persons or nations—not merely from "outside" of them, and not at all from "between" them. "Supranational law," as thus defined by him, seems to the author to be indefinite. "Supranational law" (or "supernational law,"), in the sense in which the expression is used by the author, is "the federal law of the society of nations" regarding which, see an article by the author, in the same volume with that of Professor Hull, pp. 320–337, entitled "The Proposed Codification of International Law and the Relation of Codification to the Proposed Establishment of a Supreme International Court of

Arbitral Justice." Professor Hull interprets his definition of "supranational law" in this sense. He regards supranational law as the law of "the Family of Nations," and draws an analogy between this law and "the law which was brought into existence [in 1789] for that new entity termed 'The United States of America.'" See his article, p. 281. Whether the law governing nations be established by agreement or by force, it comes from above, and there exists a human law-giver. Who or what is this human law-giver as respects the nations? In the light of recent study of the science of jurisprudence, this question may, it would seem, easily be answered.

It is now agreed that law, in the sense of the science of jurisprudence, emanates from a political society, and is imposed by that society upon the members. Law, in this sense—which is the sense we are considering—is a body of rules imposed by a society upon its members. Until quite recently scholars have fallen into the error of confusing the organs of the society with the society itself—the agent with the principal. Because the parliament, the congress, the emperor, the king, the president, the courts, the subordinate officials, the shifting majority of electors or voters, actually do the work of governing, we regard them as law-givers; whereas they are merely the organs of the society, and the whole society, of which they are organs and agents, is the real law-giver.

Thus when two or more nations agree to apply a certain principle in a specified class of cases, they together constitute for this purpose a single society, of which they act as organs, and the principle established becomes a law of the society and is enforced by the society.

All law governing nations therefore is imposed upon the separate nations by a society of peoples and nations

which may include all or a part of them, and which is above and superior to each of them.

This idea of a political society composed of all the peoples and nations, which is a law-giver for the nations, is but an enlargement of conceptions which are common among us. Great states and empires exist which are composed of states, and in which the whole society acts as a law-giver for the component units to the extent necessary in the common interests. The United States and the British Empire are examples of such societies. The latter includes nations of every variety of race, civilization and creed. The expression "the society of nations," as a term signifying the political society composed of all the peoples and nations, or of all the civilized peoples and nations, is coming into common use. Professor Westlake asserts that what is usually called international law is the law of the society of nations. (*International Law*, by John Westlake, Part I, Peace, ed. 1910, p. 1.) It is, we venture to assert, not going beyond the fact to say that at the present moment, the nations and peoples of the world are, by agreements, by commerce, by relationships, indissolubly and federally united, so that they together constitute a body politic and corporate, which is the law-giving personality above the nations.

But this will no doubt be at first denied, and it will be urged that the society of nations is only an imaginary body politic and corporate. Before it can become a fact, it will be said, it must be created as an institution among men, its functions must be defined and it must be provided with suitable officials and organs by which to express itself.

As respects the first objection, it may be answered that a corporation need not be created by express action of the state or of the persons or political units

composing it, and that a body politic or corporate may exist by being recognized as a corporation by a given state or by society at large. In the same manner, an inclusive political society having states and their peoples as its component units need not necessarily arise by the process of creation or through express agreement of the component units, but may exist through their recognition of themselves as forming such an inclusive society. The truth seems to be that the society of nations exists by the recognition of the nations and of the people of the nations—that is by the recognition of society at large.

As respects the second objection, the powers of the society of nations regarded as a political corporation are defined by the circumstances of the case and by the needs of the situation. There is no need for the nations to submit themselves to any law-giving personality as respects their strictly internal and domestic affairs. Experience has shown that civilization is advanced by the nations exercising all functions in this respect. The only need, in the interests of civilization, is, that there should exist a law-giving personality as respects those matters which are common to all or which are beyond the competency of any one. The powers of the society of nations as a law-giver for the nations are therefore limited by the necessity and propriety in the case, to those which are needful in order that those matters which are common to all may be disposed and regulated according to a common plan for the benefit of all, and in order that those matters may be adjusted which concern more than one and less than all the nations, and which are therefore beyond the competency of any one of them to decide. In a word, the society of nations is by the nature of the case a federal body politic and corporate, and its central government, if one can be

said to exist, is a federal government as respects the nations, and exercises the usual powers of such a government.

In reply to the third objection, that there are no officials or organs of the federal government of the society of nations, it may be said that if this were true, it would not be fatal. A corporation may exist without officers, and a body politic may exist without a government or under a provisional government. When there is no designated governing body, the powers of the corporation or nation revert to the whole membership of the corporation or nation, who may designate their officials and divide among them the powers of the corporation. The designation of a governing body is thus wholly a matter of convenience. If it be more convenient under any given circumstances for a corporation or a body politic to manage its affairs otherwise than through a governing body specially designated, or through a provisional government pending the establishment of a permanent government, it is competent for it so to do.

It appears to be the case that it is more convenient under present circumstances that the federal government of the society of nations should not be placed in charge of a specially designated and authorized governing body and that the federal powers should be exercised by or under the supervision of the nations themselves as the ultimate federal government, in such manner that the rights of the minority may be respected. As has been said, when certain of the nations through treaties or conventions, agree to establish a rule between them based on principles of justice, they are acting as the organs and officials of the society of nations and as its federal government to a certain extent, and are respecting the rights of the minority by not enforc-

ing the rule except between the agreeing nations. A specially designated and authorized governing body could hardly be based on any other than the representative principle, and whether the basis of representation were wealth or population, or both, the majority of the representatives would necessarily rule. Experience has proved that the representative principle is applicable only among homogeneous populations of high civilization inhabiting a territory all parts of which are contiguous. Nations and peoples which though homogeneous are of low civilization, or which are heterogeneous in race or creed, or which are of varying degrees of civilization, or which inhabit regions separate from each other, must affect their common ends and must adjust those disputes in which more than one and less than all are concerned, through some species of government,—informal or even formless almost though it may be,—whereby the local circumstances of each may receive due consideration and whereby the danger of a majority which is in fact a political coalition seeking control and aggrandizement may be averted. The society of nations, regarded as a political society, is composed of heterogeneous and separated nations and peoples, and its government must therefore be so constituted and carried on that all danger of majority rule may be avoided and opportunity be given for each nation or any minority of the nations to take such measures and abide by such rules as it or they may deem necessary for self-protection and self-preservation and for the common welfare of all. Such a federal government of the society of nations does, we venture to assert, exist.

Before attempting, however, to describe this government, it will be desirable to notice, first, that the society of nations, regarded as a federal body politic, is of what

may be called the mixed form. The study of the science of government has shown that there are two general classes of federal bodies politic—one in which the component states or the whole people designate individuals who collectively constitute the federal government, and the other in which one of the states or a group of them constitute the federal government or control the designation of the individuals who constitute such government. The society of nations appears to partake somewhat of the nature of each of these forms. Such gatherings as the Hague Conferences have some resemblances to a federal government on representative principles, though such conferences are only advisory; yet as matter of fact, the supernational law of the world is made principally through the persuasive hegemony of the group of nations which we call "the great Powers."

It will be desirable, also, to bear in mind that, as the result of recent study of jurisprudence, it has been shown that all government, whether the form of the body politic be unitary or federal, involves the performance of two and only two functions—the formulation of laws and the enforcement of them. Law, in the sense of the science of jurisprudence, as has been said, emanates from a political society, and is imposed by the society upon its members: but law does not exist until it is formulated by the society and it is in a state of suspended animation unless it is enforced in the cases to which it is applicable.

Lastly, it will be necessary to remind ourselves that though we may think and speak of nations or other corporations as forming a government of an inclusive society, just as we may think and speak of a corporation composed of corporations, nations and corporations are, after all, bodies of persons, and our enquiry resolves

itself in the last analysis into a search for the persons who formulate and enforce the law of the nation or corporation which we are considering.

Who, then, are the persons who, in behalf of the society of nations and as its federal government, formulate and enforce the federal law of the society, which we call international law, but which we should, it would seem, call the supernational law? Those who formulate the law are clearly the publicists, the members of embassies and legations, the members of the foreign departments, the members of councils and senates who pass upon the ratification of treaties, and the members of the national legislatures who, in the last resort, pass upon great conventions between the nations and determine the foreign policy of each nation. These officials act, we may believe, as a general rule, not merely in the interests of their own nations, but in the interests of the peace and order of the world. The law-enforcing officers of the society of nations we find among the executives of the nations acting both in their civil and in their military capacity. Rarely can there be found a national executive who does not, when attempting to wield the power of his nation against other nations, consider the interests of the rest of the world as well as those of his own nation, or at least attempt to do so. The military and naval officers of to-day, familiar with the whole world, seek to make their national flags emblems of civilization, and to use the engines of destruction only that obstacles to progress and illumination may be removed: and victorious soldiers are often sympathetic teachers and guides of the vanquished. When civilized nations seek to impose their judgments upon countries external to them, they more and more tend to justify their action, in the eyes of the nations; attempting to show, by reason and argument, that the action in

question is necessitated in the interests of the common welfare as well as in their own interests.

But it may be said that all this is fanciful,—that the case for supernational law has not been made out—that it is well not to change an old expression like "international law" which has served a good purpose, self-contradictory though this term may be—that the compromise which was good enough for our fathers ought to be good enough for us.

But all compromises regarding matters which are of constant occurrence are in the nature of things temporary. By the process of evolution a point is certain ultimately to be reached where a definite decision of the question has to be made. That point has, it would seem, been reached as respects the law governing the nations. The common juridical sentiment—to use the expression of Rivier—has now evolved to the point where it is no longer satisfied with a law purporting to govern the nations which in the last analysis is no law at all but merely an agreement between certain of them. The meaning of law is now clearly understood, and it is also understood that there is no reason why nations, like other persons and corporations, should not be subject to law. There is no desire that the nations should yield their rights of self-preservation or self-protection. As respects the language in which supernational law shall be formulated and as respects the manner of its enforcement, the nations are regarded by the common juridical sentiment as the safest judges. But there is a growing insistence that there shall be a true supernational law, to the extent that such a law is possible consistently with national self-preservation and self-protection. Judicial, not political, settlement of international disputes is earnestly advocated by the leading statesmen of the world, in so far as such settle-

ment is possible without destroying the nations. The demand for a supreme court of the society of nations to supplement the present international arbitral tribunal, leaving to the arbitral tribunal the function of settling questions which are of a nature to be settled by political compromise rather than by judicial decision, becomes more and more pressing.

It seems, therefore, that the time has come when supernational law must supplant that which is called "international law." Out of regard for the national rights of self-preservation and self-protection, we must proceed cautiously in working out details, and objections of nations to submit their disputes under a law admittedly supernational should be viewed leniently; for a supernational law will destroy itself if it destroys the nations. As a true supernational law must protect and preserve the nations as well as regulate them in the common interests, it is consistent with such a law that the nations should decline to submit to judicial settlement any questions, which, if decided adversely to them, would result in their destruction. Indeed, when the supernational law is finally formulated, it must of necessity, as it will in fact be the federal law of the society of nations, itself exclude from judicial consideration questions which involve the self-protection or self-preservation of any nation. But even when such questions are excluded, the scope of supernational law is wide.

The acceptance of "the federation of the world" as an existing fact does not necessarily involve a belief in the ultimate evolution of a "parliament of man." Formulation of laws by parliaments involves the rule of the majority. Majority rule is just only when the members of the minority have equal opportunity with the members of the majority to convert a minority into

a majority. When the majority is fixed and certain, majority rule is permanent domination of the minority by the majority. Moreover, majority rule is just only when each representative understands the local conditions and circumstances of all the communities represented. Ignorance of the majority may result in its permanent imposition of unjust rules upon the minority. In the society of nations there is always danger that a majority may, through ignorance of local conditions, impose unjust laws upon a minority. Those who accept the idea that the society of nations is an existing fact and that it is the law-giver of a law which governs the nations and regulates them in their common purposes, are in reason forced to believe only that the existing federal government of the society of nations will continue to evolve along its present lines. They will not seek to abolish the present federal government and to establish in place of it a "parliament of man," but will endeavor by investigation and study to invent improvements in the existing federal government, so that it may more and more perfectly formulate and enforce the supernational law, while preserving all the nations and protecting the minority of them from being permanently dominated or ignorantly imposed upon by the majority.

INTERNATIONAL LAW AND POLITICAL SCIENCE

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IT is a truism that the science of law proper—the science dealing with the national law of each nation—is very different from the science of what is called international law. In the study of the law of the United States or the law of Great Britain, one finds the whole science based on the fact of the existence of a political society known as the United States or Great Britain, which formulates, applies, and enforces the law which governs these nations in their internal relations. When one enters upon the study of what is called international law, one finds himself expected to accept as a fundamental proposition that there is no political society which formulates, applies and enforces the law which he is told governs all nations in their external relations, and that this *law* is formulated, applied and enforced *among* or *between* the nations. This difference in fundamentals leads to corresponding differences in the derivative notions. Practitioners of law proper take little or no interest in what is called international law. From their point of view, that which is called international law is only a collection of the rules of a highly interesting game, success in which depends largely upon "face" and personality; nor can it be denied that there is much to justify this opinion. Students of law reflect the attitude of mind of the practi-

tioner, and the great majority of students end their legal education when they finish the courses in national domestic law, giving no consideration to the law which governs the actions and relations of the nations.

In recent years, the development of what is known as political science, which is the science dealing with the structure and working of political societies, has accentuated the difficulties of students who wish to gain some knowledge of the political and legal affairs of the world. They study the structure and working of the town, the country, the state, and the nation for the purpose of making these political societies more economical and efficient. They even go beyond the confines of the nation and study the structure and working of vast political organisms like the British Empire for the same purpose. But when they seek to apply political science to the structure and working of the whole human society, they are confronted by a prevalent idea that beyond the limits of nations, or at least beyond the limits of political organisms like the British Empire, there is political chaos. They are taught that the nations are sovereign and independent, but that all the nations have the mutual attribute of solidarity. If the word solidarity is given its technical meaning, it seems not to imply a complete or a federal unity, but rather a mutual relationship of the persons or societies concerned under an implied contract of each with each, and with all, whereby all are the mutual guarantors of each other. In this technical sense, solidarity of the nations, seems, when analyzed, to imply a universal extension of the balance of power system, which for four centuries has drenched Europe with blood. If the nations are mutually guarantors of each other, it necessarily follows that if one nation becomes expansive or aggressive, "international solidarity" compels its sur-

rounding neighbors to ally themselves so as to balance or overbalance the power of the aggressor nation, for the purpose of holding it in check. This is exactly the balance of power system. It leads to shifting alliances, *ententes* and concerts. The system in operation is essentially a military game, requiring the application of rules of strategy. It is the antithesis of political organization, and though it may ultimately lead to political organization through the exhaustion of the parties and their perception of the waste and inefficiency involved, it frequently involves a military dictatorship as an intermediate process.

But the march of events is modifying this technical meaning of solidarity, and the word is coming into popular use in a new and enlarged sense as implying an existing unity, federal in type, of the whole body of the peoples and nations of the world. This enlarged meaning of solidarity is apparently due to the effort of the public mind to find a word to express the altered views which people everywhere are beginning to have concerning human society as a whole. Educated and uneducated persons alike, familiarized by the public press with the doings of all the peoples and nations of the world through the processes of modern invention, now understand that the world is made up of political societies much resembling those to which they are accustomed. It is becoming more and more impossible to induce the average man to believe that his nation is related to other nations after the manner of savages or half-civilized persons. It is becoming increasingly easy for him to realize that all the peoples, countries, states, nations, and empires of the world are in fact, by the necessity of the case and by their own consent, united into one great political organism and society. It has become necessary to give this inclusive society a name,

and the name of "the society of nations" is rapidly becoming attached to it—not because the name is scientific and strictly accurate, but because it is brief and expresses fairly well the idea intended.

The fact seems to be that, in this last decade, there has occurred what may be termed in some sense a peaceful revolution and in some sense a renaissance. There has been during this period a change of thought away from the accepted philosophy and a taking up with a new philosophy of a higher type. For a political economy which regarded human happiness as based on production and distribution of commodities, and made credit—the inviolableness of contracts—the prime requisite, there is being everywhere established a political philosophy which is based on the moral worth and dignity of the individual, and insists that contracts and relationships inconsistent with this dignity are not of binding force. All contracts and relationships are subjected to this test of invalidity, and, as all social and political organization is in its last analysis only a system of individual contracts and relationships, all such organization is being subjected to the same test. Thus, all forms of social and political organization which are inconsistent with the moral worth and dignity of the individual are coming to be regarded as void, and governments are considered to be just, economical, and efficient, not according as they protect the production and distribution of commodities, but according as they recognize, protect, and preserve the moral worth and dignity of each and all individuals. Political organization is thus regarded as an inseparable incident of human life and as an attribute of the individual. In other words, we are changing to a philosophy which treats political organization and government as in part an attribute and in part a creation of man. Where two

human beings exist together, contracts, and relationships exist between them and they form a community, in spite of themselves, which is a political organization and a government. Political organization and government are, in this new philosophy, regarded as necessities which the individual must have whether he will or not, just as he must breathe air or drink water. He may take government in a crude and harmful form just as he may breathe bad air, or drink polluted water; but he cannot avoid being in contractual or actual relationship with other human beings and hence forming a political organization with them any more than he can avoid breathing or drinking. All he can do is to see to it that he gets pure government, pure air, and pure water.

This new philosophy, as has been said, is gradually making its way, tempering the harshness of the old trade and credit economy. That philosophy had resulted in the sacrifice of human life and dignity to the production and distribution of goods, in the inviolability of contracts even though they called for the sacrifice of life and dignity, and in free competition whereby the strongest might overcome the others and establish any relationships with the vanquished even to the destruction of life and dignity. The new philosophy is altering the outlook of the individual upon all kinds of social, economic, and political organization. Each individual recognizes all kinds of organization as a possible means of extending his own powers, though capable of being perverted so as to injure or destroy him. He is beginning to understand that organization exists and that all he can do is to change it; and as he seeks for a limit to the extension of organization, his mind refuses to stop short of the whole human society. As each human being is born a citizen of his city, a citizen of his state, or a

citizen of his nation, so also, it is being realized, he is born a citizen of that great inclusive society composed of all the peoples and nations of the world. He may change his citizenship in the city, the state, or the nation; but his citizenship in this great inclusive society which, for want of a better name, we call "the society of nations" is permanent and unchangeable. He cannot escape this citizenship; he can only improve the organization so as to make it more consistent with the moral worth and dignity of himself and all other human beings. Nor can the whole body of the peoples of the world by any action prevent the society of nations from existing. They cannot even ignore it, for once it is recognized, it becomes the only permanent human institution, and an object of the solicitous care of the peoples and nations; for through the society of nations, the nations as well as the individual realize the fullest extension of their powers.

It requires but a moment's reflection on the part of an intelligent person to perceive that if the common sense and judgment of the world accept the society of nations as a part of present day practical politics, it can be made a subject of study by political science exactly in the same way as a town, a city, a state, a nation or an empire. In this view, the law which governs the nations is the law which is imposed on the nations by the society of nations. The nations obey this law not because they wish to do so, or because they agree to do so, or because they regard it as a matter of honor to do so, but because the peoples and nations of the world recognize themselves as together forming a political society which is greater than any nation and which includes all nations, and have delegated to that society the function of formulating, applying and enforcing a constitution and

law for the common and general purposes of all the nations. The constitution and law so formulated by this political society by virtue of its delegated power, bind the separate nations and their peoples in the same way that the constitution and law of the United States bind the States of the United States and their peoples. That which is called international law is thus seen to be the law of the society of nations, or, to use the briefer and more popular expression, the law of nations.

It is true, there are difficulties in the way of the acceptance of these modern notions. In the society of nations there is nothing to be found exactly resembling a constitutional convention, a legislature, an executive or a court, as we know these institutions in our national life. Nevertheless, in the society of nations one may distinguish and identify crude institutions of a constitution-making, legislative, executive and judicial character and may discover crude constitution-making, legislative, executive and judicial processes going on by which the constitution and law of the society of nations are gradually being formulated, and by which those constitutional and legislative provisions which have been formulated are being interpreted, applied and enforced.

When the society of nations is further studied according to the methods and principles of political science, it will be found that, although it is in the primitive stages of organization, it even now bears a general resemblance to a federal state. The central government at the present time will be found to be deposited in commission, and the commission is of so indefinite and changeable a character as to be hardly recognizable. The Hague Conferences and the Hague Tribunals have tended to visualize the central government of the society of nations, but these institutions are, after all, but a

fractional part of the institutions which even at the present moment constitute the central government. The indefiniteness concerning the location of the central government and concerning the nature and extent of its powers leads to a corresponding indefiniteness respecting the residual powers of the various nations. The nations, on account of these deficiencies in the central government, are obliged to act in a double capacity, and at times not only to perform their own domestic functions, but to exercise the functions of the central government. Thus, though the principles of federal government are to be taken as a general guide in studying the structure and working of the society of nations as a matter of political science, and in studying the law of the society, these principles are subject to many qualifications and variations, due to the present indefiniteness of the organization of that society.

For the purpose of showing how the acceptance of the society of nations as a fact of practical politics alters the fundamental principles of the law which governs the nations, it will be attempted to state these principles. Such a statement might be as follows:

1. The society of nations is a political society composed of all the peoples, countries, states, nations and empires of the world. It exists by its own recognition of its existence, having no human superior. It is permanently instituted by the necessity of the case and by the common consent of all the peoples, countries, states, nations and empires as their supreme organ for formulating, applying and enforcing their conscience and will as respects the general measures necessary for their common protection and welfare, and for the preservation of the component nations and political societies without change except as may be needful

for the common good. The society of nations establishes and maintains such constitution-making, legislative, executive and judicial institutions and processes, as are considered by the people and nations of the society to be best adapted for these purposes respectively.

2. The law of the society of nations is the body of rules, duly formulated, applied and enforced by the society of nations through appropriate institutions and processes, regulating the actions and relations of the nations and their citizens. This law extends only to the common and general purposes of the nations and the whole society, and resembles the federal law in a federal state.

3. The law of the society of nations (like the law of all states, particularly the law of federal states) is divided into three grades—the organic (or constitutional) law, the statutory law, and the customary (or common) law. The organic law is superior to both the statutory and the customary law. The statutory law is superior to the customary law. The organic (or constitutional) law is composed of those principles which are so fundamental and permanent as to be indispensable to the structure and organic existence of the society. The statutory law is composed of those principles, consistent with, dependent upon and in support of the organic law, which are formulated and established by legislative institutions and methods. The customary (or common) law is composed of those principles, consistent with, dependent upon and in support of the organic and statutory law, which are formulated and declared by courts or judicial tribunals in cases arising before them, based on common and accepted custom of the peoples and nations of the society.

4. The present organization of the society of nations being indefinite, the ultimate constitution-making, legislative, executive and judicial power of the society is for the present vested in the nations, acting collectively or separately as the organs of the society. The highly civilized and well-armed nations take the lead in formulating, applying and enforcing the constitution and law of the society, partly by the general consent, and partly by the necessity of the case; but all the nations are at liberty to formulate, apply and enforce, individually or by agreement, such principles as they may consider it probable the society of nations would formulate, apply and enforce in the circumstances. The use of armed forces by separate nations to establish justice and maintain order, in execution of the constitution and law of the society of nations, is justifiable, and is not to be regarded as war, but as constabulary action in the name of the executive power of the society of nations.

5. Nations, states, or countries, may form any sort of relations or make any contracts with each other which are not self-destructive as respects either party or destructive as respects third parties, and which are not opposed to the constitutional dispositions of jurisdiction accepted by the society of nations, or to the limitations imposed upon the nations by the constitution of the society. When a relationship is thus established, or a contract is thus made, the same principles apply in interpreting the relation or contract as are applied in interpreting similar relationships or contracts between individuals or corporations, or between the states of a federal union; but these principles are to be applied only by way of analogy.

6. All differences between nations with respect to which there exists a duly formulated and settled prin-

ciple of the organic law of the society of nations and also a duly formulated statutory principle or an established custom consistent with such organic principles, or with respect to which the parties are able to agree upon principles which are to be regarded as principles of the law of the society of nations for the purposes of the case, if not settled by agreement, may be settled by arbitration or by the decision of a court of the society of nations. Where there are no such principles, and the parties are unable to agree upon such principles for the purposes of the case, other nations may mediate for the purpose of finding a way to settle the difference, or the matter may be postponed to await the formulation and establishment of the applicable principles by a conference of all the nations or of all the nations interested; and it is the duty of all nations to urge such postponement, and to cooperate for the formulation and establishment of such principles. When such postponement is impossible, armed force applied by one nation against another to compel it to recognize a principle of the law of the society of nations which approves itself to the common juridical conscience of the world, is justifiable.

7. Treaties between nations for the arbitration of disputes between them not capable of settlement by agreement, or for the submission of such disputes to judicial settlement, should exclude all cases which involve a principle of the organic law of the society of nations which has not been formulated and settled by the constitution-making action of the nations, since it is not the function of arbitral tribunals or courts to formulate and settle the organic law of the society of nations. These principles can only be settled by the nations directly, either by joint agreement, or by the insistence of one or more nations backed by

armed force if necessary, supported by the common juridical conscience of the world. In an arbitration or judicial settlement of disputes other than those last mentioned, under a general arbitration treaty, the tribunal or court is to apply the settled principles of the organic, the statutory, and the customary law of the society of nations in the order of superiority as above stated. In interpreting settled principles of the organic law of the society of nations, the tribunal or court is to be guided by analogy drawn from the principles of the constitutional law of states and nations, and particularly by analogy drawn from the federal constitutional law of federal states. In interpreting settled statutory rules of the law of the society of nations not inconsistent with the organic law, the tribunal or court is to be guided by analogy drawn from the rules of the law of states and nations relating to the interpretation of statutes, and particularly by analogy drawn from the rules relating to the interpretation of federal statutes in federal states. In declaring and interpreting the customary law of the society of nations not inconsistent with the organic and statutory law, the tribunal or court is to consider all treaties and all national statutes or judicial decisions involving principles applicable to the case, and is to be guided by analogy drawn from the statutory and customary law of states and nations, and particularly by analogy drawn from the federal statutory and common law in federal states. Such analogies are not to be pushed to the point where national rights of self-protection and self-preservation would be endangered by premature or excessive admixture of peoples in different stages of civilization or of divergent ideas or sentiments, or by unregulated economic competition; but all reasoning by analogy drawn from state or national

action is to be subject to national rights of self-protection and self-preservation, since the existence of the nations is fundamental to the existence of the society of nations. When disputes arise between nations under treaties, the tribunal or court is to consider the treaties themselves as subject to the law of the society of nations. Treaties found by the court to be repugnant to the law of the society of nations are to be held contrary to public policy and void, to the extent that they are so repugnant, and the case is to be decided according to the law of the society of nations.

8. The autonomy of all nations is inviolable except where the autonomy of a nation is opposed to the constitution and law of the society of nations and is inconsistent with the peace and welfare of the society. An entry by a nation into the territory of another in the name of the executive power of the society of nations, must be based on an intolerable condition of anarchy there prevailing or upon a breach of the law of the society of nations by the nation entered, of so serious a character as to render restraint or punishment of the nation necessary, in the interests of the society of nations; and the constabulary power thus applied must be only carried to the extent necessary to effect the necessary reorganization of the nation thus policed. If entry by armed force is made without due cause by one nation into the territory of another, the nation entered has the right to use its armed force in self-defense; and the right of self-defense exists when, after lawful entry by a nation, it attempts the destruction or excessive punishment of the nation entered.

9. An entry by a nation into the territory of another nation, made by means of armed force, even though lawful as an exercise of the executive power of the

society of nations, gives of itself to the constabulary nation no right to territory or property of the nation policed; but a transfer of the territory of the nation thus policed, or an indemnity, may be awarded to the constabulary nation by the concert of the nations or by the concert of the interested nations, of such extent or amount as may be proper, considering its expenditure or loss and all other circumstances.

It will be noticed that in the above statement of the fundamental principles of the law of the society of nations, there is a wide departure from the various *Codes de la Paix* with which the pacifist literature abounds; in that the application by a nation of armed force outside its limits is not considered as in all cases unjustifiable and illegal. Such principles are undoubtedly inconsistent with immediate disarmament, but they are, it may be confidently asserted, the only principles likely to bring about a general condition of peace. The recognition of the society of nations as an existing fact gives a basis for distinguishing between those applications of armed force by nations which are and ought to be lawful as exercises of the executive power of the society of nations, and those which are and ought to be unlawful as acts of robbery or oppression. Any application of armed force by a nation against another which tends to support at the same time the nations and the society of nations is and of right ought to be lawful, and armed force directed by a nation so as to produce the contrary effect is and ought to be unlawful. Being thus able to distinguish between constabulary action and war, it remains only to educate public sentiment so that more and more the application of armed force by the nations shall in fact be constabulary action in the name of the executive power of the society of nations. As the area of constabulary action

increases, the area of war necessarily diminishes. As the peoples and nations of the world become more and more habituated to the notion of the application of armed force by the nations for the constabulary purposes of the whole society, separate nations will gradually become anxious to rid themselves of this constabulary burden and will be ready to unite in forming some plan for delegating their constabulary responsibilities. When this occurs war will be abolished in the society of nations by exactly the same process that individual fighting and private war have been abolished in the separate nations—that is, by political organization. The crude constitution-making, legislative, executive and judicial institutions and processes which now exist in the society of nations will gradually be improved upon and rendered more definite and efficient, and some kind of arrangement will ultimately be made which will minimize the burden of constabulary action and preserve the general peace and order.

From what has been said, it may, it would seem, be concluded that international law in its literal and technical sense as law between or among nations is destined gradually to pass into the oblivion which awaits outworn sciences and philosophies, both because such a law is inherently impossible as a matter of jurisprudence, and because it cannot be squared with the principle of political science. If the name international law is retained, therefore, it must be given an enlarged meaning, so that it shall in fact mean the law of the society of nations. Such a meaning has already been attempted to be attached to it by many writers, and from the time of Grotius the society of nations has been recognized by publicists in a figurative sense. What is now needed is, that publicists should accept the society of nations not in a figurative but in a literal

sense, as an existing and permanent fact of practical politics—as a political organization having a concrete existence just as really as has the United States or as has Great Britain. Until recently, the facts of international life have made men in practical politics hesitate to accept this fact and have compelled them to adopt compromise notions. Violent insistence upon national sovereignty has required equally violent assertions of national sovereignty in return. The situation has now changed, and almost without our notice the facts of international life have become such that the conception of a society of nations and of a law of this society has become more reasonable as a working basis of action than the conception of the nations as wholly sovereign and wholly independent, living under agreements with each other which they choose to regard as law.

No doubt for a long time to come there will be few principles of the law of the society of nations which will be so definitely formulated and established that any national court would think of applying them in superiority to a treaty or a national law with which they should conflict. As international tribunals increase, however, the question of the effect which should be given to principles of the law of nations as controlling and superseding treaties and national laws inconsistent with these principles will become a pressing one. If the Court of Arbitral Justice is established at The Hague, it will be essential to its success that the principles of the law of the society of nations should, within the sphere suitable for that law, control and supersede all conflicting treaties and national laws. That court already exists in principle by the action of the Second Hague Conference. It wants only the appointment of the judges. Once established, it will

be a court of the society of nations. If it gives effect to all treaties and all national laws which bear on the cases brought before it, without ascertaining whether or not they conflict with the organic, statutory or customary law of the society of nations, it will abdicate its high function and become merely a part of the diplomatic machinery of the disputing nations. Thus in a very concrete sense, the idea that a society of nations exists and that it has formulated and is formulating a federal law which within the sphere of the common interests is superior to treaties between the nations and superior to the municipal law of each nation, is of service at the present time; for on the acceptance of this idea depends the establishment of the Court of Arbitral Justice at The Hague.

But even if we leave out of consideration the proposed new court at The Hague, and look solely at the general benefit to be derived from the prevalence of this idea, we may find good reasons for accepting it. It is to be noticed that the society of nations has no human superior, and that it exists not by any external recognition, but by the mental and psychological action of the individuals who compose it. No formal federation of the nations is necessary. It is only necessary for the peoples and nations of the world to recognize themselves as forming one organized political society. Each individual and nation is as important as any other in exercising the power of recognition, and each individual or nation is equally entitled to participate in the work of improving the organization of the society to which he belongs. Historians have noted that the beginning of the real progress of a nation occurs when its people realize their existence as a nation, and come to understand that the nation in the hands of the people can be made one of the greatest

means for extending the power of the individual and enabling him to increase his own happiness. Out of such a popular conception of the nation and of the possibilities of individual good to be derived from an economical and efficient national organization, has developed the whole system of democratic representative and responsible government, whereby each person capable of intelligent judgment is enabled to participate, in an orderly and appropriate manner, in the direction of each political organization of which he is a member. On such ideas is based the present progressive movement, which is extending throughout the world. That movement is, in each nation, a conscious effort of individuals, parties and corporations to invent improvements in existing political organization, so that town, city, state and nation may in their respective spheres operate more economically and efficiently in extending the powers of the individual and enabling him to increase his happiness. A similar consciousness, shared by all the peoples of the world, of the existence of the society of nations as the one permanent and all-inclusive nation, and a similar appreciation by them of the possibilities of human betterment through improvements in the organization and working of this great society, must, it would seem, necessarily result in broadening the progressive movement, and lead to a conscious and persistent effort of individuals, parties and corporations in all parts of the world, directed toward improvements in the organization of this great nation, to the end that it, too, may be made more efficient in extending the powers of the individual and enabling him to increase his happiness. As such conscious efforts applied within each nation by its citizens have always resulted in a notable increase in the prevalence of justice, order and peace among

the individuals forming the nation; so similar efforts by citizens of the society of nations may ultimately result in a prevalence of justice, order and peace among the scattered and diverse peoples and nations which together form the society of nations, in some degree approaching that which each nation now enjoys within its own borders.

Lest what has been said may be thought to furnish some support for those who seek the immediate federation of the world under a "parliament of man" enacting a "world-law," let it be said that there is nothing in the foregoing which is intended to give support to any such idea. The form which the organization of the society of nations will take, and the changes in the constitution-making, legislative, executive and judicial processes of the society which will occur, as the result of progressive improvement, it is impossible to foretell. It may well be that the ultimate form will be quite different from anything yet known, and one which would be unimaginable at the present time.

THE PARTICIPATION OF THE ALIEN IN THE POLITICAL LIFE OF THE COMMUNITY

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IN discussing this subject, it is necessary, first of all, to distinguish between the political rights of the individual—whether he be a citizen or an alien—and his civil rights. By political rights we mean his rights to exercise the power of voting and of governing. By civil rights we mean his social and economic rights—his rights of life, liberty, and property. It is settled by the consensus of the civilized world that political rights are not universal, like the rights of life, liberty, and property, but that they are special rights, or privileges, to which some persons in every community are justly entitled and others are not. The rights of life, liberty and property correspond to the three attributes of life, motion and prehension, with which every human being is endowed by his Creator, and the exercise of which, under proper conditions and limitations, is essential to the existence of every human being. Accordingly they are universal, and civilized nations recognize a rule of supreme law securing these civil rights. On the other hand, the right to vote and to govern corresponds to the attribute of judgment, which is not common to all, and is possessed only by sane civilized adults, who have been educated in judgment. Each

nation, within reasonable limits, determines for itself who have the requisite judgment to be able, with advantage to the community, to exercise the power of voting and governing. The decision of the Supreme Court of the United States, in 1874, in the case of *Minor* v. *Happersett* (21 Wallace, 162), in which it was held that participation in the political life of a State of the Union was not a right of life, liberty or property, nor a necessary incident to citizenship of the United States, was but an application of the established customary law of the society of nations.

Considering now the various ways in which the resident alien may participate in the political life of the community, we take up first, his participation in its abnormal political life. Naturally, participation in proceedings designed to produced anarchy comes first. Here it makes no difference whether the alien is a resident or a mere visitor in the country. The offence of preaching anarchy or acting in accordance with anarchistic principles, is an offence against all nations individually and against the society of nations. The interposition of the nation of which such a resident alien is a citizen, would be confined to seeing that the offence was fairly proved and that cruel or unusual punishment was not applied. Anarchists are international outlaws and are to be treated as such.

Participation by resident aliens in open revolutionary movements raises an entirely different set of questions. A revolutionary movement may be morally right and necessary as the only means of preventing oppression by a government which is persistently acting contrary to the ends of its institution and violating the rights of the individual to his life, liberty or property. The movement is not for the overthrow of all government, but for the deposition of certain persons claiming to be

a particular government. If a revolutionary movement succeeds, the revolutionists form the government of the nation. Participation by resident aliens in revolutionary movements may, however, bring upon them the vengeance of the government, or be a cause for complaint, by the government, against the nation of which the aliens are residents, or may be invoked as justification for revoking concessions made to resident aliens; and if the resident aliens appeal to their nation, the nation has to determine its course according to the needs of the situation as viewed from its own standpoint and from the standpoint of the society of nations. Considering the danger to the peace of the world from revolutionary movements and the desirability of having political evils corrected by orderly and systematic methods, nations are very slow to give their protection to their citizens who engage in revolutionary movements in foreign countries. They will, indeed, take into consideration the fact whether or not the alien acted under compulsion in participating in the revolutionary movement, and whether or not his participation was rather for the purpose of protecting life or property than for the purpose of rendering the revolutionary movement successful. In other words, they will consider his intent, as well as his acts.

The general rule seems to be that if a resident alien participates in the revolutionary movements, he does so at his own risk, and if the nation of his citizenship interferes to protect him, it will be because, looking at the question both from the national standpoint and the standpoint of the society of nations, it is willing to countenance or excuse the revolutionary movement as the only reasonable means of combating intolerable oppression. The protection of the alien would in such case be an incident of national policy. The prin-

ciple was thus expressed in a letter from the Secretary of State of this country to our minister to Corea, in 1897. (Moore's Digest, Vol. IV, p. 15.)

> It behooves loyal citizens of the United States in any foreign country whatsoever, to observe the same scrupulous abstention from participating in the domestic concerns thereof, which is internationally incumbent upon his Government. They should strictly refrain from any expression of opinion or from giving advice concerning the internal management of the country, or from any intermeddling in its political questions. If they do so, it is at their own risk and peril. Neither the representative of this Government in the country of their sojourn, nor the Government of the United States itself, can approve of any such action on their part, and should they disregard this advice, it may perhaps not be found practicable to adequately protect them from their own consequences.

Participation by an alien in revolutionary action, therefore, is not a complete bar to his own nation extending him its protection; but if it does extend him its protection, it will be because of its views of national and international policy and of abstract right and wrong as bearing on the revolution in question.

The next question which arises is as to the effect which voluntary participation by the alien in the normal political life of the community, with its consent, has upon the right and duty of his own nation to protect him. Such an action on his part is analogous to becoming a citizen of the nation of his residence, and if carried sufficiently far, the nation of which he is a citizen may, it would seem, properly refuse him protection on the ground that his actions amount to a renunciation of his citizenship. It seems that the exercise of the franchise by the alien, or even his hold-

ing office in the nation of his residence, or participating in the military service of that nation, does not of itself operate to prevent his nation from extending to him its protection; but that, as bearing upon the question whether the alien has expatriated himself and forfeited his right to protection, such action on his part will be considered as important evidence tending to prove expatriation. (Moore's Digest, Vol. III, pp. 730–735, 783, 785.)

The right of expulsion as respects civilized aliens is now rarely exercised by civilized nations except as against aliens who have participated in the abnormal political life of the community; but it may be exercised on this ground without giving cause for international complaint. The Alien and Sedition Acts adopted by the Congress of the United States in 1798 were entirely consistent with international law, being directed against alien political agitators who were trying to engage this nation in a foreign war and probably also in a civil war. Another class of questions which has arisen is, as to the extent of the protection which a nation gives its citizens who are residents in a foreign nation which has a military conscription system, against the claim of that nation to compel them to participate in its political life as soldiers or to pay a military exemption tax. The law on this subject is so uncertain, that the question is usually settled between particular nations by treaty. One point seems, however, to be settled, namely, that in case of emergency and necessity—as, for instance, where there is danger of invasion, or of attack by savages—the military or constabulary service of aliens, whether residents or sojourners, may be compelled. The strong tendency seems to be for nations to regard as an unfriendly act compulsion to perform military service exercised against their citizens by other nations in

which they reside, but to permit without remonstrance the taxation of such persons for military purposes, if the taxation is uniform with that imposed on other persons for the same purpose. (Moore's Digest, Vol. IV, p. 65.)

A question arises as to the rights of resident aliens to participate in the political life of the community when a country inhabited by civilized persons is ceded by one nation to another. This matter is generally regulated by the treaty of cession. If the country ceded is contiguous to the nation to which it is ceded, so that it can properly be incorporated with its inhabitants into the body-politic of the nation, it is customary to provide for such incorporation and for citizenship of the nhabitants on equal terms with the other citizens of the nation. If the country is non-contiguous, so that it is impossible to incorporate it in the body-politic of the grantee nation, treaty arrangements can, of course, go no farther than to recognize the ceded country as having a sufficient degree of statehood so that it may have its own citizenship, and to provide that the civilized inhabitants at the time of cession shall be citizens of the ceded country. Those general principles have been recognized in the treaties of cession made to this nation.

A question of the protection which a nation gives to its citizens residing abroad, in their political rights, led to the Boer War. The Transvaal Republic—or, as it was called, the South African Republic—controlled by persons of Dutch descent, asserted the right to impose such terms upon resident aliens with regard to acquiring citizenship as it might see fit, and in fact imposed such terms that the acquisition of citizenship was made exceedingly difficult, at the same time taxing the resident aliens and placing discriminating burdens

on them. The resident aliens were equal or superior in civilization to the native citizens. They were a mixed body of persons who had been attracted by the diamond-field near Johannesburg which began to be exploited in the year 1886. The alien population, called Uitlanders by the Dutch, collected in towns and cities on the diamond-field—the Rand, the Dutch population being scattered throughout the country. The foreign residents increased until they nearly equalled the Dutch citizens. The South African Republic was under the suzerainty of Great Britain, and by the convention determining the specifications of the suzerainty, all foreigners "conforming to the laws" of the state were entitled to enter and reside there and were protected in their civil rights and against discriminating taxation. Nothing was said in the convention respecting their participation in the political life of the state, and as regards their political rights they were subject to the rules of international law. The question was treated as one of international law; the suzerainty being regarded as limiting the right of other nations to intervene but not otherwise affecting the case. Great Britain, in behalf of all Uitlanders, insisted that it was the duty of the South African Republic to provide a method of naturalization of foreigners on reasonable terms—the reasonableness of the terms to be determined by the custom of civilized nations as to admitting resident aliens to citizenship. The South African Republic insisted on terms making the acquisition of citizenship much more difficult than is customary. Lord Milner, as High Commissioner, in his famous dispatch to the Secretary of State for the Colonies, of May 4, 1899, based the case of Great Britain upon its right of international intervention to protect its citizens, partly on the ground that the action of the South

African Republic affected the honor and vital interests of Great Britain, and partly on the ground that it was for the interests of civilization that the right claimed by the South African Republic, to keep civilized resident aliens in a status of political inferiority as long as it might see fit, when they desired to become citizens, should not be yielded to by the civilized nations. In that dispatch he said:

[The Uitlanders] have many grievances, but they believe all these could be gradually removed, if they had a fair share of the political power. This is the meaning of their vehement demand for enfranchisement. Moreover, they are mostly British subjects, accustomed to a free system and equal rights; they feel deeply the personal indignity involved in a position of permanent subjection to a ruling caste, which owes its wealth and power to their exertion. The political turmoil in the Transvaal Republic will never end till the permanent Uitlander population is admitted to a share in the Government, and while that turmoil lasts, there will be no tranquillity or adequate progress in Her Majesty's South African dominions. . . .

It is this which makes the internal condition of the Transvaal Republic a matter of vital interest to her Majesty's Government. No merely local question affects so deeply the welfare and peace of her own South African possessions. And the right of Great Britain to intervene to secure fair treatment of the Uitlanders is fully equal to her supreme interest in securing it. The majority of them are her subjects, whom she is bound to protect. But the enormous number of British subjects, the endless series of their grievances, and the nature of these grievances, which are not less serious because they are not individually sensational, makes protection by the ordinary diplomatic means impossible. . . .

The true remedy is to strike at the root of all these injuries—the political impotence of the injured. What diplo-

matic protest will never accomplish, a fair measure of Uitlander representation would gradually, but surely, bring about. It seems a paradox, but it is true, that the only effective way of protecting our subjects is to help them to cease to be our subjects. . . .

It could be made perfectly clear that our action was not directed against the existence of the Republic. We should only be demanding the establishment of rights which now exist in the Orange Free State, and which existed in the Transvaal itself at the time of, and long after, the withdrawal of British sovereignty. It would be no selfish demand, as other Uitlanders besides those of British birth would benefit by it. It is asking nothing from others which we do not give ourselves. And it would certainly go to the root of the political unrest in South Africa, and though temporarily it might aggravate, it would ultimately extinguish the race feud, which is the great bane of the country.

Lord Milner's position was adopted by the British Government.

Professor Westlake, in his lecture on "The Transvaal War," delivered in the University of Cambridge on November 9, 1899, more fully interpreted the government's position and justified the intervention of Great Britain in the internal affairs of the South African Republic to secure for the resident aliens a participation in its political life, as one of those extraordinary rights which grow out of an intolerable situation—the kind of rights referred to in our arbitration treaties as rights to protect the national honor and vital interests. He said:

[This] is a war between two ideals, of which only one is a racial ideal. On one side we have the English ideal of a fair field for every race and every language, accompanied by a humane treatment of the native races. . . . The other ideal. . . . is founded. . . on the desire to maintain

the Dutch language, the Dutch social and political system, and its mode of treatment of the natives. We must not at once condemn an ideal because it is a racial one. The larger part of the world is governed by racial ideals. . . . We are in a minority in having an ideal which is not a racial one, and we must look with respect, if not with approval, upon ideals which present themselves to the larger part of civilized mankind. . . .

Ideals are always propagandist, and there is another circumstance about them, that they admit of no compromise. There may be a compromise between different measures proposed to be carried out, but between two ideals there is none. The franchise and representation asked for by the Uitlanders by Sir Alfred Milner could not be otherwise than a death blow to the Boer ideal. Now we may think, and I have no doubt that most of us do think, that the English ideal is the better of the two, but that will not give us a right to enter upon a crusade for its propagation. If we allow propagandism to be a cause for war the result will be anarchy throughout the world. And who are we that we should take upon ourselves to say that our own ideals are not only the best, but so much the best as to make it worth while to propagate them in spite of the horrors caused by the sword? I must say that sometimes I have a feeling, which perhaps not many of you share, when I see the extent to which the English language and institutions are spreading over the world, that even if that spreading is brought about solely by pacific and fair means, there is a possibility that that danger may be incurred which the poet has expressed when he wrote "Lest one good custom should corrupt the world." I am therefore by no means inclined to hurry the extension even of our own ideal. We must then all of us ask what is the justification for that demand which Sir Alfred Milner made at the Bloemfontein Conference and which has since been maintained, that the English ideal should be adopted in the Transvaal Republic or war should follow, as it has followed. . . .

I think that the demand on our part was not founded on

any legal right, but that it may have been justified, probably was justified, by one of those situations that occur in the mutual relations of nations, soluble by no canons of legal right, but for which a higher justice must be appealed to—that larger justice which in this country is exercised not by courts applying the law as it is, but by Parliament altering the law—and which is sometimes necessary between nations, bringing into operation demands not founded upon a legal position but upon the intolerable character which a certain situation has assumed.

Without entering into a discussion of the much-mooted question whether there were not other and less worthy issues involved in the Boer War, it seems fair to say, as Lord Milner did, that in a case where a nation denies all participation in its political life to citizens of civilized nations of whose training and capacity for voting and governing there can be no doubt, that nation by its act injuriously affects these nations and the society of nations; for such action, if persisted in and if followed by other nations, would destroy the society of nations and civilized society in general.

Had the persons desiring such participation been citizens of uncivilized states, or citizens of civilized states not having the requisite training or capacity, the case would have been entirely different. In such case there would have been no question of the honor and vital interests of the society of nations being injuriously affected, since it is for the advantage of the society of nations and of civilization in general that the civilized nations should deal cautiously with the uncivilized nations, and should not permit untrained or incapable persons to participate in their political life as voters or governors.

The question of the participation of resident aliens in the political life of the community is thus seen to

involve the most fundamental principles in international life. To deny them all such participation is to destroy the society of nations by fostering national and racial unsociability; to allow unlimited participation is also to destroy the society of nations by allowing lower standards of civilization to pull down higher standards and thus to produce social chaos. Those capable of exercising the franchise and the governmental power should, in the interests of the society of nations, have participation in the governments of their choice; those incapable should be gradually rendered more capable until their limit of capacity is reached, and participation in political life should follow promptly upon attainment of the capacity for such participation. On the other hand, racial and national ideas are to be respected and even fostered, so far as they are not inconsistent with the preservation of the society of nations. No more delicate or important task rests upon a government than that of deciding upon the nature and degree of the protection which it shall give to its citizens resident in other nations who participate in the normal or abnormal political life of the community, or who are compelled against their will to so participate, or, who, being qualified by capacity and training to vote and govern, desire to become citizens of the nation of their residence and are denied this privilege.

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